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Supreme Court, U.S.
F I L E D

NO 00 . 944 OCT - 1 2000

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 2000

REINIER NESLO,

Petitioner

V.

BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Reinier Neslo, #95210
Pro Se
Magnolia-1, Main Prison
Louisiana State Penitentary
Angola, LA 70712

92 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeal for the Fifth Circuit's dismissal of the petitioner's appeal violates the Fourteenth Amendment's guarantee of due process by holding that the petitioner's notice of appeal was untimely filed.

2. Because the United States Court of Appeal for the Fifth Circuit dismissed petitioner's appeal for lack of appellate jurisdiction, does this court have the jurisdiction to grant certiorari, vacate and remand this case as so ruled in Hohn v. United States.

PARTIES TO THE PROCEEDING

The petitioner in this case is Reinier Neslo. The respondent in this case is Burl Cain, Warden, Louisiana State Penitentiary, as listed in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Reinier Neslo respectfully submits this petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in Neslo v. Cain, 99-31392, filed on December 27, 1999. This case was filed in the United States District Court, Eastern District of Louisiana, under case number 97-CV-1269-B on April 21, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, was entered on June 16, 2000, and reported without published opinion at 220 F. 3d 588 (5th Cir. 2000). The Judgment of the United States Court of Appeal for the Fifth Circuit is printed in the Appendix, page 1.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeal for the Fifth Circuit from which petitioner Neslo seeks review was issued on June 16, 2000, with a timely motion for rehearing denied on August 3, 2000 (Appendix page 2.) This petition is timely filed. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY PROVISIONS, AND RULES INVOKED

The text of the Fourteenth Amendment of the United States Constitution is set forth in pertinent part as followss: " . . .nor shall any State deprive any person of life, liberty, or property, without due process of law". U.S. CONST. Art. XIV. The text of 28 U.S.C. § 1254(1) provides in relevant part that

cases in the Court of Appeals may be reviewed by the Supreme Court by a writ of certiorari. 28 U.S.C.§ 2253 (c)(2) provides in relevant part that a petitioner must obtain leave to appeal by making a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2107 (c) provides in pertinent part:

"The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause."

Federal Rules of Appellate Procedure 4(a)(5) provides in pertinent part:

A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) that party shows [**4] excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

STATEMENT OF THE CASE

On May 1, 1980, petitioner, Reinier Neslo, was indicted for violating Louisiana Revised Statute section 14:30, First Degree Murder by having the specific intent to kill or to inflict great bodily harm while engaged in the perpetration or attempted perpetration of aggravated kidnapping. At arraignment, the petitioner entered a plea of not guilty. On

December 5, 1980, petitioner was convicted and sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. The conviction and sentence was affirmed and made final on May 23, 1983.

The petitioner filed numerous motions and applications for various avenues of post conviction relief through the Louisiana state courts. On May 21, 1997, nearly fourteen years after his conviction was made final, petitioner filed his petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Louisiana. On July 18, 1997, the magistrate judge assigned to the case issued a recommendation that the petitioner's petition be dismissed without prejudice for failure to exhaust state court remedies. The United States District Court followed said recommendation and dismissed the petition. Petitioner then appealed the lower court's order to the United States Court of Appeals for the Fifth Circuit, who vacated the District Court's judgment and remanded the case back to the district court for further proceedings on September 1, 1998.

On April 5, 1999, the magistrate judge again recommended dismissal of the petitioner's petition. The District Court subsequently denied petitioner's petition on July 27, 1999, holding that the petitioner received a fair and impartial hearing in the state trial court and that he failed to show any constitutional deprivation as a result. (Appendix, page 2).

On August 12, 1999, the petitioner filed a motion for extension of time to file his notice of appeal/certificate of appealability. (Appendix, page 3.) Said motion was granted by the District Court on August 16, 1999. (Appendix, page 4) On September 24, 1999, the petitioner mailed to the District Court a second motion for extension of time to file his notice of appeal on the grounds that he was not emotionally nor mentally able to prepare his motion for appeal due to the

illness and subsequent death of his mother, who passed away on September 18, 1999. Said motion, which was docketed on September 27, 1999. (Appendix, page 5). The petitioner waited for a response from the court as to his motion, but none was timely given. On December 1, 1999, the District Court finally ruled on the second motion for extension of time in denying said motion (Appendix, page 6). On December 14, 1999, the petitioner filed a motion for reconsideration to the district court, asking the court to reconsider the December 1st judgment. The petitioner also filed his notice of appeal and certificate of appealability on which was docketed on December 15, 1999. On December 22, 1999, the district court denied motion for reconsideration and the issuance of a certificate of appealability on the grounds that the petitioner had failed to timely file his notice of appeal.

On December 27, 1999, the petitioner filed an appeal with the United States Court of Appeal for the Fifth Circuit, asking that the appellate court issue a certificate of appealability. On June 16, 2000, upon its own motion, the Court of Appeal denied petitioner's motion for a certificate of appealability on the grounds that the court lacked jurisdiction to hear petitioner's case. Petitioner subsequently filed a petition for rehearing on June 23, 2000, (Appendix, page 7.) which was denied by the Court of Appeals on August 3, 2000. (Appendix, page 1).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeal for the Fifth Circuit erred in dismissing the petitioner's appeal when it concluded that the court lacked jurisdiction to hear the appeal. This decision should be reversed and remanded back to the Court of Appeal for Petitioner's acts falls under the unique circumstances doctrine because he relied upon acts by the district court which led him to believe that his motion for extension to time to file his notice of appeal had been granted.

Further, this case concerns the power of this court to review holdings that violate the constitutional rights of the petitioner and to correct judicial errors that have deprived him of review on the merits of his claims.

ARGUMENT

A. By dismissing the petitioner's appeal for lack of appellate jurisdiction, the United States Court of Appeal for the Fifth Circuit has misconstrued the Fourteenth Amendment prohibition against deprivation of liberty without due process.

The Fourteenth Amendment of the United States Constitution provides in pertinent part that no person shall be deprived "of life, liberty, or property, without due process of law". U.S. CONST. Art. XIV. Petitioner avers that the dismissal of his appeal for relief under 28 U.S.C. § 2254 violates the Fourteenth Amendment's prohibition against deprivation of liberty without due process because the District Court acted in a manner which led him to believe that his right to an appeal of the district court's judgment was being preserved and perfected pursuant to the applicable statutory and rule provisions.

1. Despite the mandatory language of Federal Rule of Appellate Procedure Rule 4 (a)(5), which allows for the filing of a motion for extension of time to file a notice of appeal, the petitioner's notice of appeal was timely under the unique circumstances doctrine

Federal Rules of Appellate Procedure Rule 3(a) provides that an appeal permitted by law as of right from a district court to a court of appeals shall be taken by a filing of a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Fed. R. App. P. 3(a). The timely filing of a notice of appeal is mandatory and jurisdictional. Browder v.

Director, Department of Corrections, 434 U.S. 257, 264 (1978). Pursuant to Federal Rule of Appellate Procedure Rule 4(a)(1), a notice of appeal in a civil case where the United States is not a party "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." 28 U.S.C. § 2107, Fed. R. App. P. 4(a)(1) (West, 2000). However, Federal Rule of Appellate Procedure Rule 4(a)(5) allows the district court to extend the time period during which a party may file a notice of appeal if the party seeks an extension within 30 days after the appeal period has expired and if the party demonstrates excusable neglect. Fed R. App. P. 4 (a) (5) . Excusable neglect is limited to an occurrence of unusual circumstances in which failure to grant an extension would result in injustice, such as the failure to learn of the entry of judgment, uncontrollable delays in the delivery of the mail, unpredictable events that affect the delivery of the notice of appeal to the clerk, unpredictable events that affect the feasibility of appeal, and plausible misconstructions, but not mere ignorance of the law or rules." Pearson v. Gatto, 933 F.2d 521, 524 (7th Cir. 1991) (citing Parke-Chapley Constr. Co. v. Cherrington, 865 F.2d 907, 908-09 (7th Cir. 1989). *See also*, Zack v. United States, 133 F.3d 451, 452 (6th Cir. 1998) (clarifying that a showing of excusable neglect is required when the motion is brought after the time for filing the notice of appeal has run). However, the excusable neglect standard applies during the second thirty day period. *See* Fed. R. App.P. 4(a)(5). Any motion filed before the expiration of the prescribed time "may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules." Fed. R. App. P. 4(a)(5).

This Court has also held in Fallen v. U.S., 378 U.S. 139 (1964), that the rules "are not and were not intended to be a rigid code to have an inflexible meaning irrespective of the circumstances." 378 U.S. at 142. Fallen, and other related cases recognize the fact that an inmate, because of his confinement, is

often rendered helpless in his attempt to comply with the procedural requirements of the rule. When a pro se litigant takes the necessary steps to perfect a timely notice of appeal, the flexibility as provided by the rules should treat the notice of appeal as timely. Harris Truck Lines v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962). Further, where a party who relies upon the trial judge's finding of excusable neglect prior to the expiration of the thirty day period and then suffers a reversal of the finding should be given great deference by the reviewing court. Harris, 371 U.S. at 217. Additionally, this Court has recognized in Houston v. Lack, 487 U.S. 266, 271 (1988), that prisoners seeking to appeal without the aid of counsel are unique in that they are unable monitor the progress of their pleadings filed in court.

When the Federal Rules of Appellate Procedure were originally adapted in 1967, Rule 4(a) allowed an extension by the district court on a showing of excusable neglect. Wright, Miller and Cooper, Federal Practice and Procedure, Jurisdiction 3d § 3950.3 (1999). The unique circumstances doctrine applies when an appellant may

> "maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into activity."

Hollins v. Department of Corrections, 191 F.3d 1324 (11th Cir. 1999). The unique circumstances doctrine has been articulated by this Court in three decisions: Harris, Thompson v. INS, 375 U.S. 215 (1962), and Wolfshon v. Hankin, 376 U.S. 203 (1964). This Court in Thompson held that an appeal should not be dismissed as untimely where the appellant relied on the

statements of the District Court and the other parties in determining when to file its notice of appeal. In Harris, this court held that a party who had reasonably relied on the district court's erroneous grant of an extension of time to appeal had made a showing of "unique circumstances" that rendered its appeal timely. Harris, 371 U.S. at 217. In Wolfsohn, this Court reaffirmed the unique circumstances exception where the appellant reasonable relied on the trial court's actions in perfecting their appeals. In its most exacting form, the doctrine of unique circumstances applies when affirmative action by the court has misled the parties. Fox v. City University of New York, 187 F.R.D. 83 (S.D.N.Y. 1999). In Fox, the United States District Court found that the plaintiff had been "lulled into a false understanding that her filing deadline could be extended," and therefore, the unique circumstances doctrine applied and her post judgment motions were timely. Fox, 187 F.R.D. at 89.

The petitioner avers that he timely filed his first motion for extension of time by filing with the 30 day period after the District Court's order. During that original 30 day period following the issuance of the court's judgment, the petitioner found out that his mother was ill and was dying. In dealing with such news, and knowing an application for certificate of appealability had to be filed by August 26, 1999, the petitioner immediately filed his motion for extension of time, which was granted immediately. The District Court granted petitioner's motion, extending said time to September 27, 1999. However, to preserve his right to perfect his motion to appeal in light of the circumstances presented due to petitioner's mother's death, petitioner filed his second motion for extension of time and reasonably relied on the district court's favorable grant of the second motion, even though no immediate order was issued. As a consequence, the petitioner genuinely believed that his motion had been granted and that he had additional time to prepare and file his notice of appeal. Upon filing his second motion for extension of time, the petitioner sought the

assistance of the Louisiana State Penitentary's Inmate Legal Program Department to complete his notice of appeal. However, due to the fact that the department was understaffed, a delay ensued, thus affecting the petitioner's ability to submit his notice of appeal timely. The petitioner also made inquiry to the district court as to the disposition of his motion and was informed that no ruling had been timely issued. Because of the petitioner's reliance on the district court's actions, combined with his mental and emotional state and the delays produced from seeking assistance from the prison's Inmate Legal Department in preparing his motion for appeal, petitioner avers that the unique circumstances doctrine applies, and that his notice of appeal was timely filed.

B. The United States Supreme Court has jurisdiction to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel.

The Federal Rules of Appellate Procedure makes specific provisions for the consideration of certificates of appealability by the entire court. Rule 22(b) of the Federal Rules of Appellate Procedure states:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a certificate of appealability pursuant to section 2253(c) of Title 28, United States Code. ... If the district jduge has denied the certificate, the applicant for the writ may then request issuance of the certificate by the circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed

to constitute a request addressed to the judges of the court of appeals." FRAP R. 22 (b).

This honorable Court in Felker v. Turpin, 518 U.S. 651 (1996), and Hohn v. United States, 524 U.S. 236 (1998), has ruled that this court has jurisdiction to review dismissals by the Courts of Appeal for failure to file a timely notice of appeal under 28 U.S.C. § 1254(1). While an appeal is a continuation of the litigation started in the trial court, it is a distinct step. Hohn, 524 U.S. at 241. Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) codified at 28 U.S.C. § 2253(c), an appellate case is commenced when the application for a COA is filed. Id. at 241. If the district judge has denied the certificate, the applicant for the writ may then request assistance from a Circuit Court of Appeal judge, Fed. R. App. P. 22 (b). However, the applicant must be able to show the substantial denial of a constitutional right. 28 U.S. C. § 2253(c). This Court in Slack v. McDaniel, 529 U.S. 473 (2000), has held that in determining whether a COA should issue where the petition was dismissed on procedural grounds has two components: one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Slack, 529 U.S. at 485.

The petitioner avers that he had filed a notice of appeal as well as an certificate of appealability. The District Court denied his certificate of appealability on the grounds that his notice of appeal was not timely filed. The reason for the untimely filing was due his reliance on the District Court's acting on his second motion for extension of time. Because the United States Court of Appeal for the Fifth Circuit has dismissed his petition for lack of appellate jurisdiction, petitioner contends that this Court has jurisdiction to hear an appeal of the denial of his petition for writ of habeas corpus pursuant to the statutory and legal authority stated above. Petitioner avers that the late filing of the notice of appeal was due to no fault of his own, and that this court has the power to

remand his case back to the lower court for further proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the case remanded to the court to reinstate the appeal.

Respectfully Submitted,

/s/ Reinier Neslo
Reinier Neslo, #95210
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 99-31392
Conference Calendar

Filed
June 16, 2000

REINIER NESLO

Petitioner-Appellant

versus

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 97-CV-1269-B

Before JOLLY, DAVIS, and DUHE, Circuit Judges.

PER CURIAM:

Reinier Neslo, Louisiana prisoner #95210, seeks a certificate of appealability (COA to appeal the denial of his application for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. We must examine the basis of our jurisdiction, on our own motion, if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987).

A notice of appeal in a civil case is required to be filed within 30 days of the date of entry of the judgment. Fed. R. Appl 4 (a)(1)(A). The Supreme Court, in a habeas corpus action instituted by a pro se inmate, held that a brief may serve as a notice of appeal if it is filed within the time alloted for filing a notice of appeal and gives the notice required by Fed. R. App. P. 3. Smith v. Barry, 502 U.S. 244, 247-50 (1992).

The only document filed by Neslo within the 30 day period was a motion for extension of time to file a COA request. In Stevens v. Heard, 674 F.2d 320, 321-23 (5th Cir. 1982), we construed a request for CPC filed within the 30-day period as a notice of appeal. If Neslo had filed his actual COA request in that 30-day period, rather than merely a motion for an extension of time to file a COA request, his COA request would have been construed by this court as a timely notice of appeal. However, his motion for an extension of time to file a COA cannot be construed as a notice of appeal. In Alamo Chemical Transportation Co. v. M/V Overseas Valdes, 744 f. 2d 22, 23-24 (5th Cir. 1984), we held that a request for enlargement of time to file an appellate brief did not constitute the requisite notice of appeal as required by Fed. R. App. P. 3(c). See also Harris v. Ballard, 158 f.3d 1164, 11166 (11th Cir. 1998) (post-Smith v. Barry case holding that a motion for extension of time to appeal should not be construed as a notice of appeal because it does not indicate an intention to appeal); Longstreth v. City of Tulsa, 948 F.2d 1193, 1194 (10th Cir. 1991) (holding that a motion to extend the time to appeal does not serve as a substantial equivalent to a notice of appeal).

Neslo did not file a notice of appeal within the 30-day appeal period. He did not file a motion for a COA, which we would have treated as his notice of appeal pursuant to Stevens

v. Heard. He filed a motion of an extension of time to file a COA motion, which is one step further removed from a motion for an extension of time to file a notice of appeal or motion for extension of time to file an appellate brief, which we held in Alamo did not constitute an effective notice of appeal. The district court's order granting the motion for extension of time clearly put Neslo on notice that he still needed to file a notice of appeal. Even after being given an extension of time in which to file his COA motion and notice of appeal, Neslo failed to do so in a timely manner.

Appellate jurisdiction has not been conferred on this court. Because we are without jurisdiction, we do not consider Neslo's COA motion. IT IS ORDERED that this appeal is DISMISSED for lack of appellate jurisdiction.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 99-31392
Conference Calendar

FILED
August 3, 2000

REINIER NESLO

Petitioner-Appellant

versus

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 97-CV-1269-B

ON PETITION FOR REHEARING

Before JOLLY, DAVIS AND DUHE, Circuit Judges.

IT IS ORDERED that the petition for rehearing is DENIED.

FOR THE COURT:

/s/ John M. Duhe, Jr.
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE MANDATE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

REINIER NESLO	CIVIL ACTION
VERSUS	NO. 97-1269
BURL CAIN, WARDEN	SECTION "E" (6)

REPORT AND RECOMMENDATION

This matter was referred to the United States Magistrate Judge for the purpose of conducting hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636 (b)(1)(B) and (C), and as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases. Upon review of the entire record, the Court has determined that this matter can be disposed of without an evidentiary hearing. For the reasons set forth below, it is recommended that the instant petition be **DISMISSED WITHOUT PREJUDICE** for failure to exhaust state court remedies.

In this petition, REINIER NESLO seeks relief from his 1980 state court conviction for first degree murder for which he is serving a life sentence without benefit of probation, parole, or suspension of sentence. Petitioner raises the following grounds for relief: 1) the trial court erred in denying his motion to suppress his confession, admitting a typed statement in evidence, including allowing the statement to be read to the jury by detective Venizia, and failing to specifically rule on the lack of probable cause; 2) the trial court erred by not granting petitioner's motion to suppress identification; 3) the trial court erred by overruling petitioner's objection to the amendment of the indictment; 4) the trial court erred by \

overruling petitioner's objection to the testimony of Edward Johnson, prior to proving the corpus delicti of the case by the State; 5) the trial court erred by overruling petitioner's objection to the testimony by Edward Johnson, that the petitioner told him that somebody had gotten killed; 6) the trial court erred by maintaining the prosecutor's objection to questions asked by counsel to Edward Johnson about a deal with the State in exchange for his testimony; 7) the trial court erred by overruling petitioner's objection to questions asked to defendant by the prosecutors concerning petitioner's prior conviction of armed robbery; 8) the trial court erred by allowing the prosecutor to ask defendant the same questions numerous times; 9) the trial court erred by permitting prosecution to go beyond the predicate for the introduction of a written statement which related to an investigation by internal affairs; 10) the trial court erred by not permitting defense access to the Grand Jury testimony of Kimmie Green; 11) the trial court erred by not granting petitioner's motion to suppress evidence; 12) the trial court erred by admitted into evidence a pistol, photographs, rights forms, a written statement, six live cartridges, and a copy of defendant's prior conviction; 13) the trial court erred by not granting petitioner's motion for a new the trial; 14) jury instructions failed to adequately define the concept of "reasonable doubt" and prohibited the jury from going beyond the evidence in search of "reasonable doubt"; 15) petitioner's conviction was obtained in violation of his rights to due process of law; and, 16) petitioner's counsel was ineffective for failing to lodge an objection to the allegedly unconstitutional jury charge.

The Court does not reach the merits of petitioner's grounds for relief since the petitioner has failed to exhaust his available state court remedies. 28 U.S.C. § 2254; Rose v. Lundy, 455 U.S. 509, 102 S.Ct 1198, 71 L.Ed. 2d 379 (1982);

Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct.1827, 36 L.Ed. 2d 439 (1973); Serio v. Members of the Louisiana Board of Pardons, 821 F. 2d 1112, 1117 (5th Cir. 1987). Generally, the exhaustion requirement is satisfied only when the grounds urged in a federal petition were previously presented to the state's highest court in a procedurally proper manner. Dupuy v. Butler, 837 F.2d 699, 702 (5th Cir. 1988). The State's response raises the issue that petitioner has failed to exhaust the claims of the allegedly defective jury instructions and the ineffective assistance of counsel because those claims are currently pending before the Louisiana Supreme Court.

A review of Neslo's pleadings reveals that he has filed a direct appeal to the Louisiana Supreme Court (81-KA-1202[1]), a wide variety of writs and post-conviction applications in state court (82-KH-0172[2], 82-KH-0686[3], 82-KH-1920[4], 84-KH-1485[5], 86-KH-0812[6], 86-KH-1795[7], 87-KH-0671[8], 87-KH-0988[9],

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[1] State v. Neslo, 433 So.2d 73 (La. 1983).

[2] State ex. rel. Neslo v. Louisiana, 412 So.2d 1091 (La. 1982).

[3] State ex. rel. Neslo v. Louisiana, 437 So.2d 1130 (La. 1983).

[4] State ex. rel Neslo v. Foti, 429 So.2d 150 (La. 1983).

[5] State v. Neslo, 459 So.2d 533 (La. 1984).

[6] State v. Neslo, 495 So.2d 300 (La. 1986).

[7] State v. Neslo, 497 So.2d 308 (La. 1987).

[8] State ex. rel. Neslo v. Louisiana, 503 So.2d 1012 (La. 1987).

[9] State ex. rel. Neslo v. Waldron, 513 So.2d 1205 (La. 1987).

88-KH-0474[10], 95-KH-2207[11]). Two applications, 96-KH-2773 and 97-KH-0435, are currently pending before the state supreme court. After reviewing these pleadings, it is apparent that petitioner has not yet exhausted all of his claims for relief.

In petitioner's direct appeal (81-KH-1202), he raised seventeen assignments of errors: 1) the court erred by not granting defendant's motion for a change of venue; 2) the court erred by not granting defendant's motion to suppress identification; 3) the court erred by not granting defendant's motion to suppress the confession; 4) the court erred by not granting defendant's motion to suppress the evidence; 5) the court erred by overruling defendant's objection to the amendment of the indictment; 6) the court erred by overruling defendant's objection to the testimony of Edward Johnson prior to providing the corpus delicti of the case by the State; 7) the court erred by overruling defendant's objection to testimony by Edward Johnson that defendant told him that somebody had gotten killed; 8) the court erred by maintaining the prosecutor's objection to questions asked by defense counsel to Edward Johnson about a deal with the State in exchange for his testimony, including the court's error in maintaining the prosecutor's objection to questions asked by defense counsel of recross-examination of Edward Johnson; 9) the court erred by overruling defense counsel's objection to questions asked to defendant by the prosecutors concerning facts and circumstances of a prior conviction of armed robbery, including subsequent objections as to impeachment of credibility and defendant's motion for mistrial; 10) the court erred by allowing the prosecutor's to ask defendant the same question numerous times; 11) the court erred by permitting

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[10] State v. Neslo, 542 So.2d 2 (La. 1989).

[11] State v. Neslo, 678 So.2d 551 (La. 1986).

the prosecutors to go beyond the predicate for the introduction of a statement which related to an investigation by Internal Affairs; 12) the court erred by admitting a written statement into evidence, including allowing the statement to be read to the jury by detective Venizia; 13) the court erred by limiting defense counsel's objection to leading questions asked by the prosecutor; 15) the court erred by not permitting defense counsel access to the Grand Jury testimony of Kimmie Green; 16) the court erred by admitting a pistol, photographs, rights forms, a written statement by defendant, six live cartridges and a copy of defendant's prior conviction into evidence; and , 17) the court erred by not granting defendant's motion for a new trial. The state supreme court affirmed petitioner's conviction and sentence on May 23, 1983.

In writ number 82-KH-0172, petitioner sought a transfer from Angola State Prison to Orleans Parish Prison. Petitioner's writ application was denied as moot on March 19, 1982. In application for writ of mandamus number 82-KH-0686, petitioner submitted a motion for the transcript of the hearing on his motion to suppress identification. Petitioner's application was denied as moot on September 2, 1983. In application for Writ of Mandamus number 82-KH-1920, petitioner sought a transfer from Orleans Parish Prison to Angola State Prison. Petitioner's application was denied on March 4, 1983. In application for writ of mandamus number 84-KH-1485, petitioner submitted a motion for change of venue. Petitioner once again sought a transfer back to Angola. Petitioner's application was denied on November 4, 1984. In application for Writ of Mandamus and Review number 96-KH-0812, petitioner sought an order directing the trial court to provide him with the opening statement and closing argument transcripts from his trial. Petitioner's application was denied on October 17, 1986.

In application for Writ of Mandamus number 86-KH-1795, petitioner sought an order directing the trial court to provide him a copy of the original police report. Petitioner's application was denied on November 21, 1986. In application for Writ of Mandamus number 87-KH-0671, petitioner sought an order directing the tiral court to furnish him with a copy or price of untranscribed portion of trial transcripts. Petitioner's application was granted on April 3, 1987. In application for Writ of Mandamus number 87-KH-0988, petitioner sought an order from the trial court to furnish him with a copy or price of untranscribed portion of trial transcripts. Petitioner's application was denied on October 30, 1987,

In application for Supervisory and/or Remedial Writ number 88-KH-0474, petitioner sought review of the trial court's denial of his application for post-conviction relief. He raised the following issues in the trial court: 1) the court erred by not granting petitioner's motion to suppress identification; 2) the court erred by not granting petitioner's motion for change of venue; 3) the court erred by not granting petitioner's motion to suppress the confession, admitting into evidence a typed statement, including allowing the statement to be read by detective Venizia; 4) the court erred by not granting petitioner's motion to suppress the evidence; 5) the court erred by overruling petitioner's objection to the amendment of the indictment; 6) the court erred by overruling petitioner's objection to the testimony of Edward Johnson prior to providing the corpus delicti of the case by the State; 7) the court erred by overruling petitioner's objection to testimony by Edward Johnson that the petitioner told him that somebody had gotten killed; 8) the court erred by maintaining the prosecutor's objection to questions asked by counsel to Edward Johnson about a "deal with the State" in exchange for his testimony, including the court's error in maintaining the

prosecutor's objection to questions asked by defense counsel on recross-examination of Edward Johnson; 9) the court erred by overruling petitioner's objection to questions asked to defendant by the prosecutors concerning facts and circumstances of a prior conviction of armed robbery; 10) the court erred by allowing the prosecutor's to ask defendant the same question numerous times; 11) the court erred by permitting the prosecutors to go beyond the predicate for the introduction of a statement which related to an investigation by Internal Affairs; 12) the court erred by limiting defense counsel's cross-examination of detective Venizia about police tapes; 13) the court erred by not permitting defense counsel access to the Grand Jury testimony of Kimmie Green; 14) the court erred by admitting into evidence a pistol, photographs, rights forms, a written statement, six live cartridges and a copy of defendant's prior conviction into evidence; and , 17) the court erred by not granting defendant's motion for a new trial. Petitioner's application was denied on April 28, 1989.

In application for Supervisory and/or Remedial Writ number 95-KH-2207, petitioner asked the court to furnish him with a copy the jury instructions. Petitioner's application was denied on September 3, 1996. In application number 96-KH-2773, petitioner raises the issue that the court erred in holding that the trial court's jury instructions were proper. Petitioner's application was filed on November 18, 1996 and is currently pending. In application number 97-KH-0435, petitioner raises the issue of ineffective assistance of counsel for failure to object to the alleged unconstitutional jury instructions. Petitioner's application was filed on February 19, 1997 and is currently pending.

Petitioner filed an opposition to the State's response stating that he has presented both exhausted and unexhausted

claims in his petition. Petitioner appears to argue that he was required to file his petition by April 24, 1997, under recent amendments made to the writ of habeas corpus by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[12] and that he had to include his unexhausted claims in order to avoid having those claims barred as successive in a future proceeding. While petitioner's argument is correct, it does not excuse his failure to exhaust.

One of the purposes of AEDPA was to curtail and restrict the availability of the writ. This was achieved by placing a one year statute of limitation in which a petitioner may file an application for writ of habeas corpus and by requiring a petitioner to bring all of his available claims in one writ application. See 28 U.S.C. § 2244 (b) and (d). These changes have placed Neslo and others in situations where they must abandon some claims in order to file a timely petition. Neslo, with full grasp of the situation, chose to ignore the new amendments and to file a petition containing both his exhausted and unexhausted claim. The AEDPA does not provide an exception for Neslo and his argument lacks merit.[13]

Petitioner further claims that the Louisiana Supreme Court's delay in ruling on his pending applications warrants this Court's review of the merits. The position of the U.S. Fifth Circuit Court of Appeals is that in order to bypass the appellate processes of his state - whether through procedural default or otherwise - petitioner "must either demonstrate

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[12] Pub. L. No. 104-132, 110 Stat. 1214.

[13] While the AEDPA amended 28 U.S.C. § 2254 b(2) to allow a court to deny a petitioner's unexhausted claims on the merits, it maintained the prohibition of granting relief based upon unexhausted claims.

cause and prejudice or show that the failure to consider his claims will result in a fundamental miscarriage of justice." Deters v. Collins, 985 F.2d 789, 795 (5th Cir. 1993) (citing Coleman v. Thompson, 501 U.S. 722, 749, 111 S.Ct. 2546, 2565, 115 L.Ed. 2d 640 (1991)). Further, the exhaustion requirement will be excused only in "rare cases where exceptional circumstances of peculiar urgency" necessitate federal court interference. Deters, 985 F.2d at 795 (citing Ex Parte Hawk, 321 U.S. 114, 118, 64 S.Ct. 448, 450, 88 L.Ed. 572 (1944)). For example, a case in which the state system's inordinate delay in reviewing petitioner's claims impinges upon his due process rights. Deters, 985 F. 2d at 795.

In the instant case, petitioner's writ applications, 96-KH-2273 and 97-KH-435, have been pending before the Louisiana Supreme Court for approximately eight and five months, respectively. Although the Fifth Circuit has not established a bright-line test for determining the length of delay necessary to violate a petitioner's due process rights, it is clear from the Fifth Circuit's prior decisions's that petitioner's these delays are not sufficient to waive the exhaustion requirement. See Shelton v. Heard, 696 F.2d 1127, 1129 (5th Cir. 1983) (16-month delay in state appellate process); Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981) (20-month delay in state appellate process); Breazeale v. Bradley,582 F.2d 5, 6 (5th Cir. 1978) (12-month delay in state habeas process); Rheuark v. Wade, 540 F.2d 1282, 1283 (5th Cir. 1976) (15-month delay in state appellate process). Furthermore, petitioner does not contend that he is factually innocent of the crime. Thus, petitioner's situation does not fall under the "miscarriage of justice" category of cases for which exhaustion may be excused. See Yohey v. Collins, 985 F. 2d 222, 225 (5th Cir. 1993).

Since the issues of improper jury instructions and ineffective assistance of counsel are pending before the state supreme court, they have not yet been exhausted. The Court must dismiss petitions which contain unexhausted claims, including those "mixed" petitions which contain exhausted and unexhausted claims. Rose, 455 U.S. at 510, 102 S. Ct. at 1199. This Court must therefore dismiss Neslo's mixed petition for failure to exhaust state court remedies.

RECOMMENDATION

It is therefore RECOMMENDED that the petition of Reinier Neslo for issuance of a writ of habeas corpus under 28 U.S.C. § 2254 be DISMISSED WITHOUT PREJUDICE for failure to exhaust state court remedies.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996).

New Orleans, Louisiana, this 18th day of July, 1997.

/s/ Louis Moore, Jr.
UNITED STATES MAGISTRATE JUDGE

APPENDIX D
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-31025
USDC NO. 97-CV-1269

Filed
Aug 10, 1998

REINER NESLO,

Petitioner-Appellant

versus

BURL CAIN, Warden,
Louisiana State Penitentiary;
RICHARD P. IEYOUB, Attorney General,
State of Louisiana,

Respondents-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

Before JONES, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM*[0]:

Reinier Neslo, Louisiana Prisoner #95210, seeks a

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[0]* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application without prejudice for failure to exhaust state remedies based on the pendency of two state writ applications. Neslo objected in the district court to the dismissal of his application and suggested that he be allowed to delete his unexhausted claims and proceed with the exhausted claims. Neslo argues in his request for a COA that the district court erred in refusing to allow him to proceed on the exhausted claims because the dismissal was not without prejudice due to the operation of the statute of limitations.

District courts must dismiss mixed habeas corpus petitions containing both unexhausted and exhausted claims. Rose v. Lundy, 455 U.S. 509, 522 (1982). Prisoners who submit mixed petitions are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims. Id. at 520. The AEDPA's limitations period began to run on April 24, 1996, and was tolled from October 11, 1996 to September 19, 1997, while Neslo's state habeas proceedings were pending. The one-year period expired in March, 1998. If this court were to affirm the district court's dismissal of Neslo's mixed petition now, it would effectively be with prejudice to refiling under the AEDPA's statute of limitations. The district court abused its discretion in dismissing Neslo's § 2254 application without allowing to him proceed as requested on his exhausted claims in light of the statute of limitations. Brewer v. Johnson, 139 F.3d 491, 492-93 (5th Cir. 1998).

A COA is hereby granted, the judgment is VACATED, and the case is REMANDED to the district court. If all claims are now exhausted, the district court is directed to consider all claims. If all claims have not been exhausted, the district court

shall allow Neslo to delete any unexhausted claims from his petition. Neslo's motion for an appeal property bond, construed as a request for release pending appeal is DENIED. Neslo's motion for appointment of counsel is also DENIED. His motion for IFP is DENIED AS MOOT.

Motion for COA GRANTED, VACATED AND REMANDED; DENIED MOTIONS FOR PROPERTY BOND, IFP, AND APPOINTMENT OF COUNSEL.

APPENDIX E
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

REINIER NESLO	**CIVIL ACTION**
VERSUS	**NO. 97-1269**
BURL CAIN, WARDEN	**SECTION "B"(6)**

REPORT AND RECOMMENDATION

This matter was referred to the United States Magistrate Judge for the purpose of conducting hearings, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636(b) (1)(B) and (C), and as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases. Upon review of the entire record, the Court has determined that this matter can be disposed of without an evidentiary hearing. For the reasons set forth below, it is recommended that the instant petition be **DENIED WITH PREJUDICE.**

I. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") includes a comprehensive overhaul of federal habeas corpus legislation, including - 28 U.S.C. § 2254. Amended subsections 2254(d)(1) and (2) contain revised standards of review for questions of fact, questions of law and mixed questions of fact and law. **Drinkard v. Johnson, 97 F.3d** 751, 767 (5th Cir. 1996), cert. denied, ___U.S. __, 117 S. Ct. 1114, 137 L.Ed.2d 315 (1997), overruled in part on other grounds, **Lindh v. Murphy,** ___ U.S.___, 117 S.Ct. 2059, 138 L.Ed. 2d 481 (1997) (Lindh effectively overrules Drinkard insofar as the retroactivity of the chapter 153 amendments are concerned); **Carter v. Johnson,** 110 F.3d 1098, 1103 (5th Cir. 1997). As to questions of fact, the amended statute "permits federal court relief if the state court adjudication of the claim 'resulted in a

decision that was based on an unreasonable determination of the facts in light of the evidence.'" Id. (citing 28 U.S. C. § 2254(d)(2)). As to questions of law, on the other hand, "a federal court may grant habeas relief only if it determines that the state court's decision rested on a legal determination that was contrary to ... clearly established Federal law, as determined by the Supreme Court. " Id. at 768.[1] " [W]hen reviewing a mixed question of law and fact, a federal court may grant habeas relief only if it determines that the state court decision rested on 'an unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court,' to the facts of the case." Id. at 768 (quoting 28 U.S.C. § 2254(d)(1)). The Fifth Circuit further explained the standard of review applicable to mixed questions of fact and law as follows: " [A]n application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it woula not be debatable among reasonable jurists. " Id. at 769.

II. PROCEDURAL HISTORY

In this petition, petitioner, Reinier Neslo, seeks relief from his 1980 state court conviction for first degree

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[1] The Fifth Circuit also noted in Drinkard that the threshold. question in review under the amended statute is whether the claim raised by the petitioner was adjudicated on the merits in state court; i.e., the petitioner must have exhausted state court remedies and not be in "procedural default" on a claim. **Drinkard v. Johnson,** 97 F.3d at 766; 28 U.S.C. § 2254(e)(2). In addition, the newly amended statute codifies the "presumption of correctness" that attaches to state court findings of fact and the "clear and convincing evidence" burden placed on a petitioner who attempts to overcome that presumption. Id. ; § 2254(e)(1).

murder for which he is serving a life sentence without benefit of probation, parole or suspension of sentence. Petitioner raises 16 grounds for federal habeas corpus relief:

1) The trial court erred in denying petitioner's motion to suppress the confession, admitting a typed statement in evidence and allowing the statement to be read to the jury by Detective Venezia, and failing to specifically rule with respect to the lack of probable cause issue.

2) The trial court erred in denying petitioner's motion to suppress identification.

3) The trial court erred in overruling petitioner's objection to the amendment of the indictment.

4) The trial court erred in permitting the testimony of Edward Johnson prior to the State proving the corpus delicti of the case.

5) The trial court erred in permitting Edward Johnson to testify that petitioner told him that someone had been killed.

6) The trial court erred in sustaining the prosecutor's objection to defense counsel's questions regarding Edward Johnson's deal with

the State in exchange for his testimony.

7) The trial court erred in overruling objections to prosecutor's questions regarding petitioner's prior armed robbery conviction.

8) The trial court erred in allowing the prosecutor to ask petitioner the same questions numerous times.

9) The trial court erred in allowing the prosecutor to go beyond the predicate for the introduction of a written statement related to an internal affairs' investigation.

10) The trial court erred in denying the defense access to the grand jury testimony of Kimmie Greene.

11) The trial court erred in denying petitioner's motion to suppress evidence.

12) The trial court erred in allowing into evidence a pistol, photographs, "rights forms, " a written statement, six live cartridges, and a copy of petitioner's prior conviction.

13) The trial court erred in denying petitioner's motion for a new trial.

14) The trial court erred with respect to its jury instructions;

15) Petitioner's counsel's failure to make a contemporaneous objection to the trial court's erroneous jury instructions constituted ineffective assistance of counsel.

In April, 1997, when petitioner filed this habeas action, grounds 14) and 15) listed above had not yet been adjudicated by the state's highest court.[2] The grounds were pending before the Louisiana Supreme Court in writ applications 96-KH-2773 and 97-KH-0435, respectively.

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[2] See this Court's original Report and Recommendation, rec. doc. # 7, for a complete enumeration of petitioner's numerous state court filings and the claims set forth in each of the filings.

It is well-established that a petitioner must first exhaust his available state court remedies before seeking federal habeas corpus relief. 28 U.S.C. § 2254 (b)(l)-(3); **Rose v. Lundy,** 455 U.S. **509, 102 S.** Ct. 1198, 71 L. Ed. 2d 379 (1982); **Nobles v. Johnson,** 127 F.3d 409, 419-20 (5th Cir. 1997), **cert. Denied,** ___U.S. ____, 118 S.Ct. 1845, 140 L.Ed.2d 1094 (1998). Generally, the exhaustion requirement is satisfied only when the grounds urged in a federal petition were previously presented to the state's highest court in a procedurally proper manner. **Dupuy v. Butler,** 837 F. 2d 699, 702 (5th Cir. 1988). Further, petitions which contain both exhausted and unexhausted claims, i.e., "mixed" petitions, must be dismissed. **Rose,** 455 U.S. at 510, 102 S. Ct. at 1199.

On July 18, 1997, pursuant to the above law, the Undersigned magistrate judge recommended that petitioner's habeas action be dismissed without prejudice for failure to exhaust. Thereafter, petitioner objected to the court's recommendation and suggested that he be allowed to delete his unexhausted claims and proceed with his exhausted claims.[3] On August 21, 1997, the district court adopted the magistrate judge's recommendation, dismissing the instant action for failure to exhaust, thereby implicitly rejecting petitioner's suggested deletion of his unexhausted claims.[4]

Approximately one year after the district court's decision, the United States Fifth Circuit Court of Appeals determined that the district judge "abused its discretion in dismissing Neslo's § **2254** application without allowing him to proceed as requested on his exhausted claims in light of the statute of limitations. " **Neslo v. Cain,** No. 97-31025, slip op. at 2 (5th Cir. Aug. 10,

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[3] See record doc. # 9.

[4] See rec. doc. # 10.

1998) (citing **Brewer v. Johnson,** 139 F.3d 491, 492-93 (5th Cir. 1998)). The Fifth Circuit remanded the matter to the district court, ordering: "If all claims are now exhausted, the district court is directed to consider all claims. If all claims have not been exhausted, the district court shall allow Neslo to delete any unexhausted claims from his petition. " **Neslo** at 2.

In accordance with the Fifth Circuit's mandate, the undersigned magistrate judge has ascertained that petitioner has now exhausted all of his habeas corpus claims. The previously pending writ applications, 96-KH-2773 and 97-KH-0435, were denied by the Louisiana Supreme Court on September 19, 1997.[5]

III. FACTS[6]

John Finney, a first year student at Louisiana State University Medical School, went to Nick's Bar on Thursday, April 10, 1980 after taking a test at school. About midnight he was joined by Suzanne Theriot and Joli Scalise, both students at the Louisiana State University School of Nursing. After about an hour, the three decided to go to Pat O'Brien's in the French Quarter. They parked their car on Conti Street between Burgundy and Dauphine and walked the several blocks to Pat O'Brien's. After a drink there, the three went around the corner to another bar on Toulouse Street where they stayed for a couple of hours. About 4:00 a.m. they were ready to go home and began the walk back to their car.

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[5] See **State ex rel. Nesto v. State,** 701 So.2d 163 (La. 1997) and **State ex rel. Neslo v. State,** 701 So.2d 164 (La. 1997).

[6] The facts set forth herein are taken from the Louisiana Supreme Court's opinion, **State v. Neslo,** 433 So.2d 73, 75-76 (La. 1983), affirming petitioner's first-degree murder conviction.

On the night of April 10, 1980 Edward Johnson was drinking in Latraina's Lounge on Freret Street. He was joined by Reinier Neslo about midnight and the two later went to Mason's in Neslo's brown Ford Fairmont. The pair drank there for several hours and then went to the French Quarter with Johnson driving and Neslo in the passenger seat. According to Johnson, "we were flirting with some people all over the quarter, being friendly, riding around. Things of that nature."

As Finney, Theriot and Scalise were walking back to the car, they were passed by Neslo and Johnson who shouted to them to ask if they were lost and needed a ride. Finney told them that they were fine, so they drove on. The car circled the block and passed them again, repeating the offer, which was again declined. The three continued to walk in search of their parked car.

Again Neslo and Johnson returned; the car backed up to the curb. The passenger, Neslo, alighted, opening the front and rear doors on the passenger side. Finney noticed Neslo was carrying a silver gun with a light brown handle at his side. Neslo took Theriot's hand and pulled her toward the car. Finney pulled back. Neslo raised the gun to Finney's face. Finney backed up several steps and Neslo pulled the trigger, hitting Finney in the mouth.

Scalise ran up toward Theriot and Neslo. Neslo grabbed her and pushed her into the back seat. He continued to struggle with Theriot with Scalise inside the car. The back door was slammed shut. Theriot broke loose and began running, turning her head to look back. Neslo shot her in the face, and she fell to the ground immediately. Neslo stared at her for several seconds and then reentered the front seat of the car. As he did, Scalise escaped from the back seat and ran around the comer. The car sped away, Neslo taking a last shot at Finney, missing over his ducked head.

Police arrived on the scene almost immediately, having been attracted by the gunfire. The victims were taken to the hospital where Suzanne Theriot died after surgery. John Finney spent six days in the hospital after surgery to remove the bullet lodged in his jawbone.

IV. EVIDENTIARY RULINGS

Federal habeas review is limited to questions of constitutional dimension, and federal courts generally do not review the admissibility of evidence under state law. **Jernigan v. Collins,** 980 F.2d 292, 298 (5th Cir. 1992), **cert. denied,** 508 U.S. 978, 113 S.Ct. 2977, 125 L. Ed. 2d 675 (1993). Such review is proper only to determine whether a state trial judge's error is so extreme "as to render the trial fundamentally unfair or violate an explicit constitutional right." **Peters v. Whitley,** 942 F. 2d 937, 940 (5th Cir. 1991), **cert. denied** , 502 U. S. 1113, 112 S.Ct. 1220, 117 L.Ed.2d 457 (1992). In determining whether there was a denial of fundamental fairness, the Fifth Circuit has stated that the erroneous admission of prejudicial evidence justifies federal habeas corpus relief only if it is "material in the sense of a crucial, critical, highly significant factor." **Hills v. Henderson,** 529 F.2d 397, 401 (5th Cir.), **cert. denied,** 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976) (quotation omitted).

A. SUPPRESSION OF CONFESSION AND EVIDENCE: READING OF STATEMENT TO JURY; FAILURE TO SPECIFICALLY RULE ON PROBABLE CAUSE ISSUE

Petitioner argues that the trial court erred in denying petitioner's motion to suppress his confession and in denying petitioner's motion to suppress evidence, specifically, a 32 caliber revolver. A hearing was conducted with regard to both motions.[7] Petitioner also contends that the state trial

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[7] See State rec., vol. 2 of 5.

court erred in allowing Detective Venezia to read petitioner's confession to the jury.

The admissibility of a confession is a mixed question of law and fact. **Miller v. Fenton,** 474 U.S. 104, 112, 106 S.Ct. 445, 450-451, 88 L.Ed.2d 405 (1985). State court findings on subsidiary factual matters are conclusive on a habeas court if fairly supported in the record. Id. at 117. Further, the habeas corpus statute obliges federal judges to respect credibility determinations made by the trier of fact. **Pemberton v. Collins,** 991 F.2d 1218, 1225 (5th cir.), **cert. denied** , 114 S.Ct. 637, 126 L.Ed.2d 596 (1993), citing **Sumner v. Mata,** 455 U.S. 591, 597, 102 S.Ct. 1303, 1306, 71 L.Ed.2d 480 (1982).

Regarding the suppression of his confession, petitioner testified that he confessed as a result of beatings received from various police officers.[8] In contrast, the pertinent police officers testified that petitioner was not touched and that his confession was voluntary.[9] Clearly, the trial court, in denying petitioner's motion to suppress, found the police officers' testimony to be more credible than petitioner's testimony.

The Louisiana Supreme Court, in addressing petitioner's claim that his confession was involuntary, stated the following:

> Detective Venezia and Officer Saucier both testified that they arrived at Green's house about 10:30 that morning. Kimmy Green came to the door and told the officers that Neslo was there. Neslo was told that he was a suspect in a murder, and he voluntarily accompanied the police to the station. Venezia called Officer Hurban to impound defendant's brown Ford

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[8] See State rec., vol. 2 of 5.

[9] See State rec., vol. 2 of 5

Fairmont that was parked on the side of the street. One of the witnesses to the murder was a Ford salesman who had been positive about the kind of car fleeing the scene.

The defendant testified that four plainclothes officers arrested him at gunpoint at Kimmy Green's house. He stated that the officers told him that he was a suspect in an armed robbery and shooting up a bar, and that he was handcuffed and taken to the police station against his will.

Upon arriving at the homicide bureau, Neslo was told that he was a suspect in the Suzanne Theriot murder and read his rights. Neslo signed the "rights of arrestee" form and was questioned by Venezia in the presence of Saucier. The questioning was conducted in a cubicle in the larger homicide office. The cubicles are separated from the main office by cloth and metal dividing walls which extend only part of the way to the ceiling. The interview was concluded about 11:30 a.m.

Following the interview Neslo was given a lie detector test. Venezia received the results of the test at about 2:30 that afternoon and formally arrested the defendant, reading him his rights a second time, and having him walked over to be booked by Officer Hurban. Venezia and Officer Saucier then went out to find John Finney and Joli Scalise for the physical lineup, which was conducted about 4:30 that afternoon.

The defendant testified that he was beaten three times in quick succession after he was given the lie detector test and before he was taken over to be booked. He claimed there was a tall slender officer involved in the beatings. According to the defendant, he was taken

to a room off of the detective bureau, handcuffed, with a white plastic bag over his head, and kicked repeatedly when he denied any knowledge of the Theriot murder. The beatings lasted for a total of forty-five minutes.

The defendant denied that he was asked if he was injured as part of the booking procedure. He did not complain to anyone that he was beaten until 2:00 o'clock that morning, approximately twelve hours after the beatings, when he was in parish prison. He wrote a letter to his mother complaining about the beatings, and she filed a complaint with Internal Affairs.

Neslo later gave a complete statement to Internal Affairs. Neslo was taken back to the homicide bureau after the lineup, where he signed a third waiver form and gave a statement beginning at 7: 10 a.m. Venezia typed the questions, then read them to Neslo; as Neslo answered, Venezia typed. Officers Saucier and Hurban were present during the time the statement was given and signed each page. The defendant initialed the first three pages and signed on the fourth. The statement was completed at 8:25 a.m....

The trial court heard testimony from all of the witnesses to the defendant's statement. Each testified that at no time was the defendant beaten, threatened or induced in any way to make the statement. The defendant's time throughout the day was accounted for by the officers' testimony....

Detective Venezia testified that following the lie detector test, the defendant was returned to the cubicle while Venezia awaited the results. At all times the homicide office contained approximately a dozen people who would have heard any beating taking place. Venezia and Saucier

> testified that the defendant was in the cubicle alone during this time. While the defendant initially stated that he was beaten following the lineup, he retracted the statement and limited the beatings to the period between the lie detector test and his booking. Officer Hurban, who walked him over to be booked, denied that the defendant was walking with a limp, and specifically denied the defendant's claim that he was not asked the standard booking question about whether he was injured.
>
> Concerning the statement itself, Neslo identified his signature and initials on the "rights of arrestee" form and on the bottom of the statement pages, but denied reading the statement before he signed it. He did admit that Venezia asked him questions and then typed, and he read the statement on the stand and remembered some of the questions. Neslo stated that he thought he was signing a report indicating the time of his arrest.

Neslo, 433 So.2d at 79-80.

Accepting the facts as found by the Louisiana Supreme Court, having found them well supported by the record, this Court also finds that petitioner's claim that his confession was involuntary, that it was obtained as a result of police beatings, is without merit. The determination of the voluntariness of a confession requires the court to consider the "totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation." **Schneckloth v. Bustamonte,** 412 U.S. 218, 224, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). Factors for the court's consideration include: (1) the length of the detention; (2) the repeated and prolonged nature of the questioning; (3) the number of interrogators; (4) the time and place of the interrogation; (5) the isolation of the defendant from family, friends and counsel; (6) the use of physical

punishment such as deprivation of food and sleep; (7) threats; (8) the failure to advise the defendant of his constitutional rights; (9) police intent in interrogation; (10) whether the questioning continued despite an unwillingness to admit guilt; (11) disregard for any applicable law; (12) the physical condition of the suspect; (13) the youth of the accused; (14) the lack of education of the accused; (15) the low intelligence of the accused; and, (16) the mental condition of the suspect. See **United States v. Gordon,** 638 F. Supp. 1120, 1145 (W.D. La. 1986), affirmed, 812 F.2d 965 (5th Cir. 1987), cert. denied, 483 U.S. 1009, 107 S.Ct. 3238, 97 L.Ed.2d 743 (1987) and the Supreme Court cases cited therein. The state bears the burden of establishing the voluntariness of a confession by a preponderance of the evidence. **Colorado v. Connelly,** 479 U.S. 157, 169-170, 107 S.Ct. 515, 522-23, 93 L.Ed.2d 473 (1986), citing **Lego v. Twomey,** 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972).

In this case, the trial court held a hearing on petitioner's motion to suppress evidence and on his motion to suppress the confession. The testimonies of the investigating police officers, as well as that of the petitioner, were received and thoroughly considered. Considering the factors listed above, the record shows the following:

Petitioner was picked up by police officers at approximately 10:30 a.m., taken to the "homicide office," advised of his rights,[10] and interviewed or questioned until only 11: 30 a.m. **Neslo,** 433 So.2d at 79. The interrogation was performed in one of several cubicles located in the homicide office, where approximately "a dozen" persons were located from the time of petitioner's questioning to the time he was

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[10] See State rec., vol. 2 of 5, transcript of motion to suppress at p. 55.

booked. Id. at 79-80.

Following petitioner's interview, a lie detector test was performed. Id. at 79. Petitioner's detention, prior to his formal arrest, lasted only until 2:30 p.m., at which time the results of his lie detector test were received and he was arrested and booked. Id. at 79. Approximately two hours later, at 4:30 p.m., after searching for and locating two eyewitnesses to the incident, a physical lineup was conducted. Id.

At the time petitioner gave a statement, three officers were present. However, only one officer, Detective Venezia, actually engaged petitioner. Venezia typed questions, read the typed questions to petitioner, then typed petitioner's responses. The other two officers merely acted as witnesses, signing each page of petitioner's statement. Id.

Petitioner contends that it was after receiving the results of the lie detector test (2:30 p.m.), but before he was booked (sometime before the 4:30 p.m. physical lineup), that he was "beaten three times." Id. However, despite these beatings, petitioner made no complaint to the booking officer nor did the booking officer note any injury to petitioner. Id. It was not until approximately 12 hours later, at 2:00 a.m., that petitioner finally complained about the alleged beatings. Id. At that point, rather than raising the issue with available prison or medical personnel, in a position to take immediate action if necessary, petitioner raised the matter in a letter to be mailed to his mother. Upon receipt of the letter, petitioner's mother reported the incident to Internal Affairs. Id.

There is no evidence to undermine the Louisiana Supreme Court's determination that petitioner's confession was "freely and voluntarily given." Id. at 80. Petitioner's claim in this regard is meritless.

Petitioner also argues that both his confession and the murder weapon, a 32 caliber revolver, were "product[s] " of his illegal arrest, and therefore, violative of the Fourth Amendment and inadmissible. According to petitioner, there is no basis to support a finding that police officials had probable cause to arrest him." [T]he record does not show what reason [police officers] had to believe that the petitioner was involved [in the murder]. " "The trial court failed to render a specific ruling on the evidence or lack of probable cause. " Instead, the trial judge, along with prosecutors, simply "assumed that the officers had probable cause. " [11]

A petitioner's ability to obtain federal habeas corpus relief with regard to an alleged Fourth Amendment violation is greatly limited by the United States Supreme Court's decision in **Stone v. Powell,** 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). In **Stone v. Powell,** the Supreme Court held that a state prisoner is not entitled to federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial as long as the State provided "an opportunity for full and fair litigation" of his Fourth Amendment claim. **Id.** at 3052. See also **Davis v. Blackburn** 803 F.2d 1311, 1372 (5th Cir. 1986).

The record reflects that a hearing was held before the state trial court with regard to both petitioner's motion to suppress his confession and his motion to suppress evidence.[12]

Following the hearing, the state district judge "overruled" both motions. [13] Thereafter, the Louisiana

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[11] See petitioner's memorandum at p. 5d.

[12] See State rec., vol. 2 of 5.

[13] See State rec., vol. 2 of 5, last pg. (pg. 127) of hearing transcript.

Supreme Court, in a lengthy opinion, specifically addressed the probable cause issue, finding ample evidence to support the trial court's determination that probable cause existed. The Louisiana Supreme Court reasoned:

> The defendant had been recognized by callers who had seen the composite sketch in the newspaper and called the police to give the defendant's name. Neslo had been tentatively picked by both Joli Scalise and John Finney as resembling the man who had fired the shots....
>
> Furthermore, the defendant's car matched the description of the car given by a Ford salesman who was at the scene of the shooting and gave a description of the car to the police.
>
> Probable cause exists when the facts and circumstances known to the police officer, and of which he has reasonably trustworthy information, are sufficient to justify an average person, and particularly an average police officer, in the belief that the person to be arrested has committed a crime. **State v. Buckley,** 426 So.2d 103 (La. 1983); **State v. Johnson,** 422 So.2d 1125 (La. 1983). There was no reason to doubt the information in the possession of the police; it had all come from the victims of the criine and uninvolved third parties. The police knew that a crime had been committed, and needed only reasonably trustworthy information to justify a person of ordinary caution in believing defendant committed the crime. **State v. Tokman,** 412 So.2d 561 (La. 1982); **State v. Jones,** 408 So.2d 1285 (La. 1982). Officer Saucier testified that the defendant was not free to leave; that he was under investigation. The police, however, had more than mere suspicion that Neslo had committed the murder of Suzanne Theriot,

> though they may not have had enough information for a conviction at that time. The trial court did not err in finding probable cause for the arrest of the defendant.
>
> Having found probable cause for the defendant's arrest, his arguments that the confession and the revolver recovered from Kimmy Green's house were inadmissible as fruits of an illegal arrest are without any basis.

Neslo, 433 So.2d at 80-81.

The fact that the trial court did not assign written reasons supporting its implicit finding of probable cause does not relieve petitioner of the restriction imposed under **Stone v. Powell.**" The rule in **Stone v. Powell** can be avoided only if the proceedings conducted by the state trial and appellate courts fail to constitute a full and fair opportunity to litigate the Fourth Amendment claim." **Rainey v. Thigpen,** 1992 WL 549133 at *2 (N.D. Ala. 1996), aff'd by 13 F.3d 409 (11th Cir.), cert. denie , 513 U.S. 950, 115 S.Ct. 365, 130 L.Ed.2d 318 (1994). This principle is exemplified in two cases, **Tukes v. Dugger,** 911 F.2d 508 (11th Cir. 1990), and **Agee v. White,** 809 F.2d 1487 (11th Cir. 1987).

> The treatment of **Stone v. Powell** in the **Agee** opinion and the expressed language in Tukes indicates that a question about the fullness and fairness of consideration is raised only when the state trial court makes no explicit findings of fact and there is no appellate opinion dealing with the Fourth Amendment claims. The **Stone v. Powell** defense was rejected in **Tukes** because neither the state trial court nor the appellate court made findings of fact or wrote an opinion dealing with the Fourth Amendment claims. By contrast, in **Agee,** the Eleventh Circuit applied **Stone v.**

> **Powell** to one Fourth Amendment claim which was dealt with in an appellate opinion, but rejected it with respect to a second Fourth Amendment claim that had not been dealt with in the appellate opinion. The lesson to be learned, therefore, is that even in the absence of explicit findings of fact by the trial court, an appellate opinion expressly dealing with the Fourth Amendment claim constitutes a full and fair consideration of the claim for **Stone v. Powell** purposes.

Rainey 1992 WL at *2-3.

Because the Louisiana Supreme Court, in **State v. Neslo**, 433 So.2d 73 (La. 1983), expressly dealt with petitioner' Fourth Amendment claims, said claims are barred pursuant to **Stone v. Powell.**

Finally, petitioner fails to set forth any support for his claim that the trial court unconstitutionally erred in allowing Detective Venezia to read petitioner's confession to the jury. As was the case in his state application for relief, petitioner "has not directed this court's attention to any statutory [or constitutional] provision or jurisprudence which support his contention that error [was] committed by the trial judge in allowing the statement to be read to the jury." **Neslo**, 433 So.2d at 81. The court finds no merit to petitioner's claim in this regard.

B. SUPPRESSION OF IDENTIFICATION

A federal habeas court must give high deference to the state court's determination of issues such as whether or not an identification process was unduly suggestive. **Sumner v. Mata,** 455 U.S. 591, 593, 102 S.Ct. 1303, 1304, 71 L.Ed.2d 480 (1982). If the state court's

determination is fairly supported in the record then the federal habeas court must presume that finding correct. **Id.**

In conducting general habeas corpus review, a federal court is limited to deciding whether the state conviction violates the Constitution, laws or treaties of the United States. **Estelle v. McGuire**, 502 U.S. 62, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991). In order for an issue of suggestive identification to rise to the level of a constitutional claim, petitioner must show both that the identification procedure used was unduly suggestive and that use of said procedure resulted in a substantial likelihood of misidentification. **Manson v. Brathwaite,** 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

In determining whether an out-of-court identification is unconstitutionally suggestive, this Court must examine the record under the "totality of the circumstances" and consider the opportunity of the witness to view the criminal, the witness's degree of attention, the accuracy of the witness's pre-identification description of the criminal, the level of certainty demonstrated by the witness, and the length of the time lapse between the crime and the identification. **Neil v. Biggers,** 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); **Manson** 432 U.S. at 116, 97 S.Ct. at 2253.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) prohibits a federal court from granting habeas relief unless a petitioner can show that the state court's determination "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. **28 U.S.C. §2254(d).** The AEDPA's standard of review is applicable to petitioner's case. **Drinkard v. Johnson,** 97 F.3d 751, 764-65 (5th Cir. 1996),

cert. denied, _____ S.Ct. _____, 1997 WL 10415 (U.S., March 3, 1997).

A review of the Louisiana Supreme Court's opinion shows that the above criteria has not been met. The Louisiana Supreme Court properly applied the test announced in **Manson** in rendering its opinion in this case, reasoning:

> After the composite sketch had appeared in newspapers, the police received phone calls saying the man resembled Reinier Neslo. Detective Venezia assembled the photographic lineup to include Neslo and others who had similar features. This is the procedure recommended by **Manson v. Brathwaite, supra,** and the American Law Institute's Model Code of Pre-Arraignment Procedure, § 160.2(2) (1975). Since only the defendant appeared in both the photographic and the physical lineups, there is the possibility of suggestion; that the witnesses might have remembered the defendant from the photograph and not from the night of the crime. Joli Scalise testified at the hearing that she identified Neslo both in the photographic display and in the on stage lineup, "but, when I saw him in the lineup, I hadn't remembered him from the pictures. " John Finney testified to not being sure if any people in the lineup had also been in the photographs.
>
> The evidence does not indicate that the identification procedures were unduly suggestive. The persons in the photographic lineup sufficiently resemble the defendant to properly test the identification. In fact, two photographs were selected by both of the witnesses. Likewise, the photograph in the record of the physical lineup shows that there was no suggestiveness in the conduct of the lineup. All of the participants were adequately

matched for basic physical appearance and five of the seven participants, including Neslo, appear to be very close in height. Number six, who was initially selected but not chosen after the witnesses went on stage, is a few inches taller than Neslo.

At the hearing on the motion, the circumstances of the initial encounter between the defendant and the witnesses was explored. Scalise and Finney both testified that while they had been out drinking and felt pretty good, they were not drunk and their senses were sharp. They had each had four or five drinks over a four hour period. Finney had stopped drinking at 3:00 a.m. Although the 300 block of Burgundy Street was not well lighted and the incident lasted less than one minute, both the witnesses saw the gunman full face and closeup and gave similar descriptions to the police. There was adequate independent basis for the identification which outweighed any suggestiveness in the use of photographs in the identification procedure. [Citations omitted.]

Neslo, 433 So.2d at 78.

In sum, this Court does not find that the state court's determination that the identification procedure was constitutionally valid is contrary to clearly established federal law or unreasonable in light of the evidence presented. The claim is without merit.

C. ERRONEOUS ADMISSION OF PISTOL AND CARTRIDGES, PHOTOGRAPHS, "RIGHTS OF ARRESTEE" FORMS, WRITTEN STATEMENT, AND CERTIFIED COPY OF DEFENDANT'S PRIOR CONVICTION

In support of the above claim, petitioner refers the court to "the reasons cited in related claims of error."[14] Likewise, for the reasons set forth in this Report and Recommendation, petitioner's claims in this regard are without merit.

D. IMPROPER ADMISSION AND/OR RESTRICTION OF TESTIMONY

1. Testimony of Co-Defendant Edward Johnson[15] Provided Prior to Establishment of Corpus Delicti

Petitioner argues that the trial court erred in allowing the prosecution to present the testimony of co-defendant, Edward Johnson, prior to establishing the *corpus delicti* via testimony from the coroner. However, a violation of a state procedural rule requiring proof of the *corpus delicti is* insufficient for the purpose of establishing a constitutional violation. In **Lucas v. Johnson**, 132 F.3d 1069,1078 (5th Cir.), **cert. dismissed**, 1998 WL 313489 (1998), the Fifth Circuit

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[14] See petitioner's memorandum at p.6d.

[15] As discussed *infra*, petitioner delineates several alleged erroneous evidentiary rulings regarding the testimony of Edward Johnson. One such ruling is the trial court's alleged refusal to allow defense counsel to question Johnson with respect to the "deal" he made with the State in exchange for his testimony. See petitioner's memorandum at p. "5je." However, after raising this argument, petitioner states: "After a review of this error petitioner notes that Edward Johnson subsequently waived his attorney-client privilege, (tr. p. 35), and the previously objected to questions were allowed to be asked by defense counsel on cross-examination and recrossexamination of Edward Johnson." See petitioner's memorandum at p. 6. Based upon the above representation, it is clear that petitioner has abandoned this ground for relief and therefore, it shall not be discussed in the body of this opinion.

specifically stated that a state "corpus *delicti* requirement is not constitutionally mandated. See, **West v. Johnson,** 92 F.3d 1385, 1393-94 (5th Cir. 1996); **Autry v. Estelle**, 706 F.2d 1394, 1407 (5th Cir. 1983) (stating that '[s]uch a state rule of '*corpus delicti*' has no independent constitutional footing.')"[16]

2. Testimony Regarding What Petitioner Had Told Johnson and Repetitive Questioning of Petitioner

Petitioner contends that the trial court erred in overruling his objection to Edward Johnson's testimony regarding statements allegedly made by petitioner regarding his knowledge of the pertinent shooting. Specifically, petitioner contends that the following testimony should have been stricken.

> Q Now, after all this took place, after you were dropped off at home, did you ever happen to see Reiner (sic) Neslo after that?
> A Yes.
> Q And where did you see him?
> A On my job.
> Q Did he come to you or did you go to him?
> A He came to me.
> Q Did he indicate to you why he came to see you?
> A Yes.
> Q Why did he come to see you?
> A He said something had happened in the quarter.
> Q Did he talk about it?
> A He was more frightened than anything else.
> Q Did he say anything?

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[16] Moreover, Louisiana state law, as noted by the Louisiana Supreme Court, "does not require the proof of the corpus delicti prior to other evidence." **Neslo**, 433 So.2d. at 82 (citations omitted).

A Yes. He told me somebody had gotten killed.
BY MR. LAWRENCE:
Your Honor, I'm going to object to anything that's not res gestae. We object to the comments of the witness.
BY THE COURT:
Why?
BY MR. LAWRENCE:
It's outside any res gestae, Your Honor, and no proper predicate has been layed (sic) for it. We have no notice of it.
BY THE COURT:
Overruled.

Neslo, 433 So.2d at 82.

The basis of petitioner's objection is the prosecution's failure to provide him with notice of the statements in violation of Louisiana Code of Criminal Procedure Article 768.[17]

Petitioner also argues that the trial court erred in permitting the State to pose the same questions to petitioner numerous times. However, petitioner sets forth no state, federal or constitutional edict which the state court presumably violated, thereby rendering the court's ruling erroneous. Instead, petitioner simply states: "[A]fter a review of this error, it is evident that the petitioner suffered from the prejudice of the Court's ruling."[18]

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[17] Article 768 provides: "Unless the defendant has been granted pretrial discovery, if the state intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the state's opening statement. If it fails to do so a confession or inculpatory statement shall not be admissible in evidence. "

[18] See petitioner's memorandum at p. 6a.

As noted earlier, habeas review of state evidentiary rulings is limited to a determination of whether the trial court's error "was so extreme that it constituted a denial of fundamental fairness.... [T]he erroneous admission of prejudicial testimony justifies habeas corpus relief only when it played a 'crucial, critical, [and] highly significant' role in the trial." **Jerniganv. Collins,** 980 F.2d 292, 298 (5th Cir. 1992), **cert. denied,** 508 U.S. 978, 113 S.Ct. 2977, 125 L.Ed.2d 675 (1993) (citations omitted). In this case, the alleged erroneous rulings amounted to nothing more than "harmless error," in light of the remaining, overwhelming evidence of petitioner's guilt. As the Louisiana Supreme Court noted:

> Johnson's testimony placed the defendant at the scene, with the gun in his possession, firing shots. This was corroborated by the eyewitness accounts and by the defendant's confession. Laboratory analysis matched the gun with the pellets retrieved from the victims. The defense's alibi evidence was conflicting and internally inconsistent. The admission into evidence of the defendant's statements to Edward Johnson, without the notice required by Article 768, was harmless error in view of the overwhelming evidence of defendant's guilt.

Neslo, 433 So.2d at 83.

3. Testimony Regarding Petitioner's Prior Armed Robbery Conviction and Prior Inconsistent Statement to Police Internal Affairs

Once again, petitioner argues that the state trial court violated state law in allowing the State to impeach petitioner by: 1) cross-examining petitioner regarding the facts and circumstances of an earlier armed robbery charge even though petitioner was ultimately convicted of simple burglary; and, 2) cross-examining petitioner regarding a prior inconsistent

statement to Police Internal Affairs."[19] However, as noted earlier, a violation of state law, in and of itself, is insufficient for the purpose of obtaining federal habeas corpus relief. Further, the alleged erroneous admission of the State's alleged prejudicial cross-examination did not play a "'crucial, critical, [and] highly significant' role in the trial." **Jernigan, supra**. The Louisiana Supreme Court recognized the existence of "overwhelming evidence that the defendant committed the crime for which he ... presently stands convicted." **Neslo,** 433 So.2d at 85.

IV. MISCELLANEOUS TRIAL COURT ERRORS

A. TRIAL COURT ERRED IN OVERRULING PETITIONER'S OBJECTION TO THE AMENDMENT OF THE INDICTMENT

Petitioner argues that the trial court erred in allowing the State to amend the indictment immediately prior to trial. As explained by the Louisiana Supreme Court:

> On the morning of trial the assistant district attorney amended the indictment to read (underlining indicates new language): "... committed first degree murder of one SUE THERIOT, while in the perpetration of an attempted aggravated kidnapping , while in the perpetration of an attempted aggravated rape, while having the specific intent to kill or inflict great bodily harm on more than one person, ..."

Neslo, 433 So.2d at 81.

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[19] At the time petitioner gave his statement to Police Internal Affairs, he also signed a "rights of arrestee" form acknowledging and waiving his rights. **Neslo** 433 So. 2d at 85.

Petitioner asserts that the amended indictment "was invalid and illegally changed the instrument of prosecution that can only be accomplished by the Grand Jury itself .... The amendment created a defective indictment which could not serve as a basis for a valid prosecution." In support of his argument, petitioner relies solely upon state law. [20]

An amendment to an indictment "will be allowed if a defendant's rights are not affected and he is adequately apprised of the charges against him so that he is protected against surprise at trial or another prosecution for the same offense." **U.S. v. Young Bros., Inc.,** 728 F.2d 682, 693 (5th Cir.), **cert. denied,** 469 U.S. 881, 105 S.Ct. 246, 83 L.Ed.2d 184 (1984) (citing **Berger v. United States,** 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935); **United States v. Cook,** 586 F.2d 572, 575 (5th Cir.1978), **cert. denied,** 442 U.S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979)). In this case, petitioner had ample notice of the charges against him and suffered no prejudice as a result of the amendment. As the Louisiana Supreme Court pointed out, the amended indictment merely conformed to the State's answer to petitioner's motion for a bill of particulars. Specifically, the State's answer apprised petitioner: "The State alleges that the murder was committed in the attempted perpetration of aggravated rape, aggravated kidnaping and the offenders had the specific intent to kill or inflict great bodily harm on more than one person."[21] This claim is meritless.

B. THE TRIAL COURT ERRED IN DENYING THE DEFENSE ACCESS TO THE GRAND JURY TESTIMONY OF KIMMIE GREENE

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[20] See petitioner's memorandum at pp. 5h-5i.

[21] See State rec., vol. 4 of 5.

The facts surrounding petitioner's alleged ground for habeas relief based upon the non-production of grand jury testimony is as follows.

> Kimmy Green testified concerning the apprehension of the defendant by the police from his house and the return later that evening of Neslo and the police to retrieve the gun. On direct examination, Green stated that he had also testified before the grand jury, and had been arrested and charged with perjury following that appearance. Green admitted at trial that he had lied to the grand jury. When asked if he had decided to now come forward and tell the truth, the defense objected and requested an admonition to the jury to disregard the leading question, which was denied. Testimony continued with Green stating that his lawyer had contacted the prosecutor about testifying at trial in exchange for dropping the perjury charge. Later, while Green was on the stand for redirect examination, defense counsel called for the grand jury transcript, which was also denied.

Neslo, 433 So.2d at 86.

Relying upon state law, petitioner asserts that the trial court committed "reversible error" by prohibiting the production of Kimmie Greene's grand jury testimony in order to impeach his trial testimony.[22] However, there is no "constitutional requirement that Grand Jury testimony of a witness ... be made available to the defense." **U.S. ex rel. Bund v. LaVallee,** 344 F.2d 313, 315 (2nd Cir.), **cert. denied**, 382 U.S. 867, 86 S.Ct. 140, 15 L.Ed.2d 106 (1965). Further, assuming *arguendo* that petitioner's argument is correct and the trial

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[22] See petitioner's memorandum at p. 6c.

court's refusal to provide petitioner with the grand jury testimony constituted a violation of state law, such a violation does not implicate a constitutional infraction. See **Maldonado v. Giarnbrum,** 1998 WL 841488, *3 (S.D. N.Y. 1998) (quotation omitted) (Petitioner's claim that the non-disclosure of grand jury testimony denied him due process is based on state law. "A writ for habeas corpus, however, cannot be granted unless there has been a violation of a petitioner's constitutional rights.")

Finally, as pointed out by the Louisiana Supreme Court, petitioner was not prejudiced due to his lack of access to the grand jury testimony.

> Under the present facts, there was no harm to the defendant due to lack of access to grand jury testimony. The prior inconsistent statement could only have been used to question the credibility of Kimmy Green (and not for the content of the statement). Green admitted that he had lied before the grand jury; further impeachment would only have been cumulative. Moreover, the jury was fully apprised of the arrangement between Green and the prosecution and could fully evaluate his credibility at trial without the content of the prior lie. **Neslo,** 433 So.2d at 87.

C. TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A NEW TRIAL

Petitioner argues that the trial court erred in denying his motion for a new trial based upon his allegation that the State's evidence was insufficient to prove he had the specific intent to kill or inflict great bodily harm. Petitioner further argues that the evidence regarding the perpetrator's identification was

insufficient for the purpose of finding guilt beyond a reasonable doubt.

The relevant portions of the first degree murder statute, R. S. 14:30, at the time of petitioner's trial, read as follows:

> First degree murder is the killing of a human being:
>
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnaping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;
>
> (3) When the offender has a specific intent to kill or to inflict great bodily harmupon more than one person.

Specific intent is defined in R. S. 14: 10(l), which, at the time of petitioner's trial, provided:

> Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act."

Regarding proof of intent, R. S. 15:445, at the time of petitioner's trial, provided that even though "intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction. "

When conducting a sufficiency of the evidence review, courts generally adhere to the standard set forth by **Jackson v. Virginia,** 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In **Jackson,** the Court held that a claim of insufficient evidence would lie if, after viewing the evidence in the light most

favorable to the prosecution, a rational trier of fact could not have found the essential elements of the crime proven beyond a reasonable doubt. **Id.** However, since the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal habeas court "may grant a writ of habeas corpus on a mixed question of law and fact, such as an insufficiency of the evidence claim, only if it determines that 'the state court decision rested on an unreasonable application of clearly established Federal law, as determined by the Supreme Court,' to the facts of the case. " **Sampson v. Roe,** 1998 WL 209159 (N.D. Cal., Apr. 28, 1998)(citing **Drinkard v. Johnson**, 97 F.3d 751, 768 (5th Cir. 1996), **cert. denied**, ____U.S. ___, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997), overruled in part on other grounds, **Lindh v. Murphy** , ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997)). A state court decision is "unreasonable" if it "is so clearly incorrect that it would not be debatable among reasonable jurists." **Drinkard,** 97 F.3d at 769.[23]

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[23] See also **Gomez v. Acevedo,** 106 F.3d 192, 199 (7th Cir.) ("Because Jackson claims are mixed questions of law and fact, we are compelled to hold that a writ of habeas corpus may be issued for evidence insufficiency only if the state courts have unreasonably applied the Jackson standard. Federal review of these claims therefore now turns on whether the state court provided fair process and engaged in reasoned, good faith decisionmaking; when applying Jackson's 'no rational trier of fact' test"), vacated and remanded on other grounds, _ U.S. _, 118 S.Ct. 37, 139 L.Ed.2d 6 (1997). Compare: **Jones v. Wood**, 114 F.3d 1002 (9th Cir. 1997) ("[Federal habeas) district court's duty to ascertain the sufficiency of the evidence by engaging in a thorough review of the complete state court record is unaffected by the AEDPA. Without such a review of the record, it is impossible to determine whether the state court adjudication rested on an 'unreasonable application' of clearly established federal law or an 'unreasonable determination' of fact.")

In addressing petitioner's claim of error in connection with the denial of his motion for a new trial, the Louisiana Supreme Court employed the **Jackson** standard, reasoning:

> There is ample evidence in this record, when viewed in the light most favorable to the prosecution, that the defendant had the specific intent to kill. " The eyewitnesses testified that defendant pointed the gun at his victims and deliberately fired the shots. Neslo first fired in the face of John Finney, who was wounded in the mouth, and then shot Suzanne Theriot, who was killed after resisting defendant's efforts to force her into the automobile. While there was no evidence of attempted rape, there was sufficient evidence to establish an attempted kidnaping. John Finney specifically testified that the "gunman tried to put Sue in the front seat, and Sue was a little reluctant to do it." After she struggled free, " she started to run away from him. She got about two steps, and for some reason, she just turned her head around. When she did, that's when the guy picked up the gun and shot her. I remember seeing him shoot her. I remember seeing the gun. He put the gun up, I saw another flash come out the barrel. "

Neslo, 433 So.2d at 87-88 (citations omitted).

The Louisiana Supreme Court further noted that the record contained "ample evidence" identifying Neslo as the gunman.

> He was identified by Edward Johnson, the severed codefendant and acquaintance of Reinier Neslo. The defendant was identified by both John Finney and Joli Scalise who saw the defendant at the scene firing the shots. Any rational trier of fact could

> conclude beyond a reasonable doubt that Reinier Neslo fired the shot that killed Suzanne Theriot.

Neslo, 433 So.2d at 88.

Based upon the above evidence, this Court finds that the Louisiana Supreme Court's application of the rule enunciated in **Jackson,** leading to its conclusion that sufficient evidence existed to convict petitioner of first degree murder, was not "unreasonable." In fact, even employing a *de novo* review under **Jackson**, leads to a conclusion that the evidence was sufficient to support the jury's guilty verdict.

V. ERRONEOUS JURY CHARGES AND INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner claims that the state trial court improperly instructed the jury that they could not go beyond or outside the evidence in reaching their verdict. Petitioner also complains that the trial court's reasonable doubt jury instruction was erroneous and that defense counsel, by failing to object to the erroneous reasonable doubt jury instruction, was ineffective.

As noted earlier, these last claims for habeas corpus relief were pending before the Louisiana Supreme Court at the time petitioner filed the instant habeas petition. On September 19, 1997, the Louisiana Supreme Court denied relief, specifically finding petitioner's claims to be untimely and procedurally barred pursuant to La. C. Cr. P. art. 930.8. See **State ex rel. Neslo v State**, 701 So. 2d 163 (La. 1997), and **State ex rel. Neslo v. State**, 701 So. 2d 164 (La. 1997).

La. C. Cr. P. art. 930.8.A, which went into effect on October 1, 1990, provides in pertinent part:

> A. No application for post conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than three years after the judgment of conviction and sentence has become final.

However, in a situation such as this, where three or more years from the finality of judgment of conviction and sentence had passed prior to article's effective date (October 1, 1990), a petitioner was given a one-year grace period, until October 1, 1991, to seek state post-conviction relief. See La. C. Cr. P. art. 930.8.A.(3).[24]

Neither petitioner nor the State question the veracity of the Louisiana Supreme Court's dismissal of petitioner's writ application pursuant to La.C.Cr.P. art. 930.8. Stated differently, neither party questions petitioner's alleged untimeliness in raising the instant claims. However, it appears, based upon this Court's review of the state court record, that petitioner did timely raise two of the above claims.

In September, 1991, petitioner filed an application for post-conviction relief with the Orleans Parish Criminal District Court, arguing: 1) that the trial court erred in instructing the jury that they could not go beyond or outside the evidence; and 2) that the trial judge's definition of reasonable doubt was "constitutionally defective."[25] Based upon this timely filing, a

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[24] Petitioner's judgment of conviction and sentence became final on May 23, 1983, the date the state supreme court denied his direct appeal, affirming his conviction and sentence. See rec. doc. # 7, magistrate judge's original report and recommendation at p. 7.

[25] See State rec., vol. 5 of 5, petitioner's "Memorandum to Support Post Conviction Application for Relief. " It appears that petitioner's ineffective assistance of counsel claim was not raised until November, 1996. See State rec., vol. 5 of 5.

doubt is cast upon the appropriateness of the state court's dismissal on art. 930.8 grounds. Accordingly, this Court shall employ two separate approaches in resolving this matter. First, presuming that the state court's dismissal on prescription grounds was appropriate, the Court shall engage in a discussion regarding whether the state's dismissal constitutes "independent and adequate state grounds." Thereafter, under the presumption that the state court's finding of untimeliness was incorrect, the Court shall address the merits of petitioner's claims.

A. INDEPENDENT AND ADEQUATE STATE GROUNDS

Generally, a federal court will not review a question of federal law decided by a state court if the decision of that state court rests on a state ground that is both independent of the merits of the federal claim and adequate to support that judgment. **Amos v. Scott,** 61 F.3d 333, 338 (5th Cir.), cert. denied , 116 S.Ct. 557, 133 L.Ed.2d 458 (1995), citing **Harris v. Reed,** 489 U.S. 255, 262, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). This "independent and adequate state law" doctrine applies to both substantive and procedural grounds and affects federal review of claims that are raised on either direct or habeas review. **Amos,** 61 F.3d at 338. (citations omitted). In order to fulfill the independence requirement, the last state court rendering a judgment in the case must "clearly and expressly" indicate that its judgment is independent of federal law and rests on a state procedural bar. **Amos,** 61 F.3d at 338; **Harris,** 489 U.S. at 263, 109 S.Ct. at 1043. In this case, the last reasoned opinion, issued by the Louisiana Supreme Court, clearly and expressly denied petitioner relief based upon the state procedural bar of prescription, as set forth in La. Code Crim. Proc. art. 930.8. Therefore, the independence requirement for application of procedural default is clearly met.

The state procedural rule must also be "adequate." "An 'adequate' rule is one that state courts strictly or regularly follow, and one that is applied evenhandedly to the vast majority of similar claims." **Glover v. Cain,** 128 F. 3d 900, 902 (5th Cir. 1997), cert. denied, ___U.S.___, 118 S.Ct. 1811, 140 L.Ed.2d 949 (U.S. 1998) (citing, **Amos,** 61 F.3d at 339). A state procedural rule enjoys a presumption of adequacy when the state court expressly relies on it in deciding not to review a claim for collateral relief. **Id.,** (citing **Lott v. Hargett,** 80 F.3d 161, 165 (5th Cir. 1996)). Petitioner herein makes no showing that art. 930.8 is not evenhandedly applied,thus the state court procedural rule is presumed adequate.[26]

A judgment resting on an independent and adequate state procedural default bars federal habeas review if the habeas petitioner cannot show "cause" for the default and "prejudice attributed thereto," or demonstrate that the federal court's failure to review the defaulted claim will result in a "fundamental miscarriage of justice." **Amos,** 61 F.3d at 338-339; **Wainwright v. Sykes,** 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); **Harris,** 489 U.S. at 262, 109 S. Ct. at 1043. Because petitioner does not contend that he is factually innocent of the crime for which he was convicted, he cannot establish that a "miscarriage of justice" would occur if federal habeas review is declined. See **Montoya v. Collins,** 988 F.2d 11, 13 (5th Cir. 1993). Therefore, this Court will only examine whether or not petitioner has shown cause for the procedural default and prejudice attributable thereto.

In order to show cause, petitioner must show that "some objective factor external to the defense" prevented him or his

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[26] The U.S. Fifth Circuit has held that La. Code Crim. Proc. art. 930.8 is an adequate state court fule to bar federal habeas review. **Glover** 128 F. 3d at 902.

defense counsel from raising this claim in a procedurally proper manner. **United States v. Guerra,** 94 F.3d 989, 993 (5th Cir. 1996) (quoting **Murray v. Carrier,** 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986)). "Objective factors that constitute cause include interference by officials that makes compliance with the procedural rule impracticable, a showing that the factual or legal basis for the claim was not reasonably available to counsel at the prior occasion, and ineffective assistance of counsel in the constitutional sense." **Guerra**, 94 F.3d at 993; see also **Robison v. Johnson,** 151 F.3d 256, 262 (5th Cir. 1998); **Rodriguez v. Johnson,** 104 F.3d 694, 697 (5th Cir. 1997); **McCowin v. Scott,** 67 F.3d 100, 102 (5th Cir. 1995).

Petitioner attempts to show "cause" for his untimeliness only with respect to his claims relating to the trial court's alleged erroneous jury instruction regarding the definition of "reasonable doubt." Petitioner asserts that he failed to timely raise these claims in prior post conviction applications because the legal basis for the claims was not reasonably available until November 13, 1990. On that date, the United States Supreme Court rendered its decision in **Cage v. Louisiana,** 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), striking down as unconstitutional a jury charge comparable to the reasonable doubt charge provided to the jury in petitioner's criminal trial. Petitioner argues that " [t]here was no way he could have possibly have [sic] known of the legal significance of the jury instructions being an error to attach [to post conviction applications] until after the [prior state law] was reversed" by **Cage.** [27]

Petitioner's showing of "cause" is insufficient. As stated earlier, petitioner had until October 1, 1991, to seek state post-conviction relief. The **Cage** decision was rendered in

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[27] See petitioner's memorandum at p. 6e.

November, 1990. Thus, petitioner had approximately eleven months to timely raise his **Cage** claims in state court.

Additionally, contrary to petitioner's assertion, a legal basis for his challenge to the reasonable doubt ury instruction was reasonably available prior to the issuance of **Cage**. As Judge Vance reasoned in **Hatcher v. Cain,** No. 98-1275 (E.D. La. Sept. 14, 1998) (copy attached):

> The Fifth Circuit has noted that challenges to the definition of "reasonable doubt" injury instructions, including arguments that an erroneous definition impermissibly lowered the burden of proof to obtain a conviction, were raised and litigated in numerous Louisiana state court cases in the early 1980's. **James v. Cain,** 50 F.3d 1327, 1333 (5th Cir. 1995); **Ward v. Cain,** 53 F.3d 106, 108 (5th Cir. 1995) (rejecting the assertion of cause for not raising a Cage claim in earlier petitions since "the claim was reasonably available since the early 1980s. ").
>
> Indeed, the Louisiana Supreme Court decided **State v. McDaniel,** 410 So.2d 754 (La. 1982), several years before Hatcher was convicted. In that case, the court reversed a defendant's criminal conviction in part because "by redefining 'reasonable doubt' as 'a doubt that would give rise to great uncertainty' and 'one that would make you feel morally uncertain as to the defendant's guilt,' the trial court instruction created a reasonable possibility [that] the jury was misled into applying an insufficient standard." **McDaniel,** 410 So.2d at 756. In light of **McDaniel** and the numerous Louisiana cases contesting reasonable doubt instructions, petitioner's challenge was not so novel that its legal basis was not reasonably available....

Hatcher at pp. 13-14; but see Wilson v. Cain, No. 97-1551 at p. 13 (E.D. La. Feb. 18, 1999) (copy attached) (citations omitted) ("Wilson could not object at the time of trial (1988) because the basis of the objection to the charge did not come into existence until Cage was decided in 1990. Thus, because petitioner is invoking a rule for which there was no reasonable basis in existing law at the time of his conviction, he has demonstrated 'cause' for his procedural default. ")

Petitioner also claims that " [t]here was no way he could have possibly ... known" of the legal significance of a challenge to the reasonable doubt instruction prior to its rejection in Cage. In other words, prior to Cage, it would have been futile for petitioner to challenge the controversial jury instruction since state courts had upheld in the past. However, such a futility argument is insufficient for the purpose of establishing "cause. " " [T]he Supreme Court held in Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), 'the futility of presenting an objection to the state court cannot alone constitute cause for a failure to object at trial.'" Hatcher at p. 14 (citations omitted). Based upon the above, Judge Vance concluded that petitioner had "failed to establish cause for the procedural default of his challenge to the trial court's reasonable doubt instruction. " Id. Petitioner herein also fails to escape the procedural bar.

B. MERITS

1. Instruction That Jury Could Not Go Beyond or Outside the Evidence

Petitioner argues that a number of constitutional problems are created when a trial court instructs a jury that it cannot go beyond or outside the evidence in

reaching their verdict and determining whether or not reasonable doubt exists. First, petitioner claims that such an instruction prohibits "the jury's consideration of the presumption of innocence because the [presumption of innocence] principle is based on the lack of evidence." [28] Second, plaintiff asserts that such an instruction unconstitutionally shifts the burden of proof to the defendant to prove his innocence."[29] Third, the trial court, according to petitioner, by strictly confining the jury's consideration to the testimony presented at trial, "indirectly" focused the jury's attention upon the fact that defendant did not testify.[30]

It is questionable whether the language petitioner is challenging raises a constitutional concern. In a recent decision, the Fifth Circuit indicated that comparable jury instructions were not "problematic from a Due Process perspective. " See **Muhleisen v. Ieyoub,** 1999 WL 104888, *4 (5th Cir. 1999). However, the Court need not reach this issue since petitioner is mistaken with respect to the premise upon which his arguments are based. Specifically, petitioner is mistaken in his belief that the trial court strictly limited the jury's consideration to the evidence presented at trial, to the exclusion of allowing the jury to consider the "lack of evidence" presented. The trial transcript reflects the following jury instruction:

> You must confine yourselves to a dispassionate consideration of the testimony given upon the trial. You must not regard any extraneous acts or

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[28] See petitioner's memorandum at p. 6g.

[29] See petitioner's memorandum at p. 6 h.

[30] See petitioner's memorandum at p. 6i.

> circumstances in reaching your verdict, but you **may consider the lack of evidence** adduced at the trial to any of the essential elements of the offense. The lack of evidence, through the testimony adduced at the trial, may be relied upon as the basis for the establishment of reasonable doubt.
>
> The jury is **not** restricted to the evidence adduced from the witness stand for the creation of a reasonable doubt."

Accordingly, petitioner's arguments are without merit.

2. Instruction Regarding the Definition of Reasonable Doubt

In the instant matter, the trial court provided the following instruction to the jury with regard to the meaning of "reasonable doubt":

> If you have a reasonable doubt as to any fact or element necessary to constitute the guilt of the accused, it is your duty to give him the benefit of that doubt, and return a verdict of not guilty.
>
> However, this doubt must be a reasonable doubt, that is, a doubt founded on real, tangible, solid, sound, common sense basis. It must be such a doubt as would give rise to a **grave uncertainty** raised in your mind, by reason of the unsatisfactory character of the evidence. This doubt must not be a frivolous doubt, or a fanciful

doubt, or one based on guesswork or caprice, but it must be a solid, common sense doubt.[31]

Now, on the other hand, likewise, if the state has proven the guilt of the accused, to your satisfaction, and beyond a reasonable doubt, it is your duty to find the defendant guilty.

If you have a reasonable doubt as to the grade of the offense committed by the accused, it is your duty to find him guilty only of that grade of which you are convinced beyond a reasonable doubt he is guilty of.

You must be satisfied of the accused's guilt by that degree of sureness which induces a man of sound mind to act without doubt upon the conclusions to which the law and the evidence leads.[32]

In **Muhleisen**, 1999 WL at n.2, the Fifth Circuit recently determined that jury instructions similar to the charges at issue were "not contrary to the Court's decision in **Cage.**" The **Muhleisen** Jury charges provided in pertinent part:

> Now, if you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty under your solemn oath as a juror to give him the benefit of that doubt. Now, even where

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[31] See State rec., vol. 5 of 5, transcript of court's charge to the jury at pp. 2-3 (emphasis added).

[32] *See* State rec., vol. 5 of 5, transcript of court's charges to the jury at p. 2 (em
hasis added).

> the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused.
>
> This doubt must be a reasonable one. That is, one founded upon real, tangible, substantial basis and not upon caprice, fancy or conjecture. It must be such a doubt as would give rise to a **grave uncertainty** raised in your mind by reason of the unsatisfactory character of the evidence. If after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory on any single point indispensably necessary to constitute his guilty, it is your duty to give him the benefit of that doubt and return a verdict of acquittal.
>
> A reasonable doubt, member of the jury, is not a mere possible doubt. It should be an **actual or substantial** doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt, **one for which** you **could give good reason.**

Muhleisen, 1999 WL at *4 (emphasis original).

The Fifth Circuit recognized that the above three highlighted phrases "are problematic from a Due Process perspective." **Id**. However, the court ultimately determined that the charge was not violative of the Due Process clause, distinguishing the **Muhleisen** charge from the instructions provided to the Jury in **Cage.**

> The **Cage** Court struck down a Louisiana jury instruction on reasonable doubt because it "equated a reasonable doubt with a 'grave

> uncertainty' and an 'actual substantial doubt' and stated that what was required was a 'moral certainty' that the defendant was guilty. " **Id.** at 4 1, 111 S. Ct. 328. Here, we only have " grave uncertainty" and "actual or substantial doubt"; the Muhleisen jury instruction does not also comment on the need for a "moral certainty" as did the **Cage** instruction. **Id.** at 40, 111 S. Ct. 328. We think this distinction is important as the Court wrote that the first two phrases only "suggest" a higher degree of doubt is being called for than is actually necessary. **Id.** at 4 1, 111 S. Ct. 328. The Court emphasized that "[w]hen those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear "that a constitutional violation has occurred. **Id.** (emphasis added). The lack of "moral certainty" in the Muhleisen instruction bars us from ruling, under the strict standards of AEDPA, in his favor.

Muhleisen,1999 WL at n.2.

In the instant matter, the only "problematic" or **Cage** phrase contained in the trial court's reasonable doubt instruction is "grave uncertainty." Accordingly, for the reasons set forth in **Muhleisen,** *supra*, this Court finds that the trial court's instruction is not contrary to the Supreme Court's decision in **Cage.** Indeed, a better argument can be made in this case, than in **Muhleisen,** that petitioner suffered no infringement of his due process rights since the instruction at issue contains less **Cage** language. At petitioner's criminal trial, in contrast to the **Muhleisen** criminal trial, the court did not describe "reasonable doubt" as an "actual or substantial doubt."

3. Ineffective Assistance of Counsel

Petitioner contends that defense counsel was ineffective due to counsel's failure to object to the trial court's reasonable doubt instruction. In **Strickland v. Washinglon** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two prong test for evaluating claims of ineffective assistance of counsel: a convicted defendant seeking relief must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. "Moreover, he carries the burden of proof and must overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance." **Crockett v. McCotter,** 796 F.2d 787, 791 (5th Cir.), cert. denied, 479 U.S. 1021 (1986) (citations omitted); **Hayes v. Maggio**, 699 F.2d 198, 201-02 (5th Cir. 1983); **Mattheson v. King**, 751 F.2d 1432, 1441 (5th Cir. 1985), cert. dismissed, 475 U.S.1138 (1986).

To prove prejudice under the **Strickland** standard, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional efforts, the result of the proceeding would have been different." **Strickland,** 104 S. Ct. at 2068. The court defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome. " **Id.**

Petitioner clearly has not met his burden of proof with respect to his ineffective assistance of counsel claim. As discussed above, the trial court's jury instructions were legally proper. Since no valid ground for objection existed, counsel's failure to object cannot be constitutionally inadequate.

Recommendation

For the foregoing reasons, **IT IS RECOMMENDED** that Reinier Neslo's petition for issuance of a writ of habeas corpus pursuant to 28 U.S. C. §2254 be **DENIED** with prejudice.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. **Douglass v. United Services Automobile Association,** 79 F.3d 1415, 1430 (5th Cir. 1996).

New Orleans, Louisiana, this 5th day of April, 1999.

/s/ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate Judge

APPENDIX F
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

REINIER NESLO	**CIVIL ACTION**
VERSUS	**NO. 97-1269**
BURL CAIN, ET. AL.	**SECTION "B" (6)**

ORDER AND REASONS

IT IS ORDERED that petitioner Reinier Neslo's objections to the Magistrate Judge's Report and Recommendation are hereby OVERRULED.

IT IS FURTHER ORDERED that, for the reasons set forth in the Magistrate Judge's Report and Recommendation, the petition for habeas corpus relief under 28 U.S.C. Section 2254 is DENIED.

As noted in the Magistrate Judge's Report, the state court record establishes that petitioner received a fair and impartial hearing before the state trial court on his motion to suppress a confession and other evidence. In addition, the Louisiana Supreme Court found there was ample evidence to support a finding of probable cause for petitioner's arrest. Further, the trial record does not reflect and petitioner fails to show any constitutional deprivations or other errors that would, in reasonable probability, alter the outcome of petitioner's state court trial.

New Orleans, Louisiana, this 27th day of July, 1999.

/s/ Ivan L.R. Lemelle
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT COURT

FILED
August 12, 1999

REINIER NESLO	CIVIL ACTION
VERSUS	NO. 97-1269
BURL CAIN, WARDEN	SECTION B(6)

MOTION FOR TIME EXTENSION
TO FILE FOR COA

MAY IT PLEASE THE COURT:

Petitioner request a 60 day extension in order to seek a COA relevant to the judgment rendered in this case.

Petitioner's mother has cancer and is expected to only live for a few days more. Therefore, petitioner request 60 days to resolve all family matters, in order to properly seek an appeal relevant to this court's denial.

Petitioner is unable to focus attention on his legal matters as a result of a visit with his mother at Touro Infirmary in New Orleans, last Thursday.

Petitioner's mother's illness is one that was surprising and unprepared for.

Petitioner wishes to challenge the Cage, Humphrey reasonable doubt jury instruction pursuant to this case. The state have yet to produce a transcript contrary to the

instructions submitted by the petitioner.

Petitioner just discovered new evidence to ignite his Campbell claim, of which constitutes a stay until other applications are exhausted in the state court.

Petitioner alleges that the detective admitted to not having probable cause for the warrantless arrest, so it is not constitutional for this Court to now establish probable cause for the state.

Petitioner have discovered new laws rendered by our federal court of appeal that is contrary to this court's judgment.

For reasons cited, petitioner request a 60 day time enlargement to seek a COA

Respectfully,

Reinier Neslo, #95210
Camp C, Bear 1
LA. State Prison
Angola, LA 70712

APPENDIX H

MINUTE ENTRY
LEMELLE, J.
AUGUST 16, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

REINIER NESLO	CIVIL ACTION
VERSUS	NO. 97-1269
BURL CAIN, ET. AL.	SECTION "B" (6)

IT IS HEREBY ORDERED that petitioner's motion for an extension of time is **GRANTED.** Pursuant to the provisions of Federal Rule of Appellate Procedure 4, petitioner is granted 30 extra days, or until September 27, 1999, to file his application for a certificate of appealability and his notice of appeal.

New Orleans, Louisiana, this 16th day of August, 1999.

/s/ Ivan L.R. Lemelle
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT COURT OF LOUISIANA

FILED
SEPT 27, 1999

REINIER NESLO	CIVIL ACTION
VERSUS	No. 97-1269
BURL CAIN, WARDEN	SECTION "B"(6)

MOTION FOR TIME EXTENSION

Petitioner's mother died in New Orleans on September 18, 1999, and was buried on September 23, 1999.

Petitioner is the only immediate family member relevant to his mother Mary H. Neslo, and he had to take time out to handle all funeral arrangements and all other family matters from the Louisiana State Prison.

Petitioner respectfully request that this Court understand the difficulties of which constitutes the need and purpose for the delay in the filing of the certificate of appealability and the notice of appeal.

Petitioner request an extension of thirty (30) days from the date of September 27, 1999, to file the required applications into this court.

It is evident that this court have a way to check and discover that the facts disclosed are true and correct in all aspects.

From: Reinier Neslo #95210
Camp C, Bear #1
La. State Prison
Angola, LA 70712

Signed on this 24th day of September of 1999.

/s/Reinier Neslo
Signature

APPENDIX J

MINUTE ENTRY
LEMELLE, J.
DECEMBER 1, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

REINIER NESLO	CIVIL ACTION
VERSUS	NO. 97-1269
BURL CAIN, ET. AL.	SECTION "B" (6)

Petitioner's Motion for an additional extension of time during which to file a certificate of appealability is DENIED. On August 16, 1999 Petitioner was granted an extension and another is not warranted.

/s/ Ivan L.R. Lemelle
IVAN L.R.LEMELLE
UNITED STATES DISTRICT JUDGE

APPENDIX K

CONSTITUTIONAL PROVISION, STATUTES AND COURT RULES INVOLVED IN THE CASE

A. CONSTITUTIONAL PROVISION

Amendment XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty_one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty_one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice

President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two_thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

B. FEDERAL STATUTES

1. 28 U.S.C. Section 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to

which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

2. 28 U.S.C. Section 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

3. 28 U.S.C. Section 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing

of excusable neglect or good cause. In addition, if the district court finds

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt ofsuch notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

4. 28 U.S.C. Section 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless _

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

5. 28 U.S.C. Section 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal

to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from _

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

C. FEDERAL RULES

1. USC Fed Rules App Proc R 3 (2000)

Rule 3. Appeal as of Right;_How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a

district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district_court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record__ excluding the appellant's __ or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries __and any later docket entries __ to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) Payment of Fees.Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

2. USC Fed Rules App Proc R 4 (2000)

Rule 4. Appeal as of Right__When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order __ but before the entry of the judgment or order __ is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment __ but before it disposes of any motion listed in Rule 4(a)(4)(A) __ the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal __ in compliance with Rule 3(c) __within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court

may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined. A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order __ but before the entry of the judgment or order __ is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following

motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order __ but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) __ becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective __ without amendment __ to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may __ before or after the time has expired, with or without motion and notice __ extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(6) Entry Defined. A judgment or order is entered for

purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first_class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14_day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30_day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

3. USCA Fed Rules App Proc R 22 (2000)

Rule 22. Habeas corpus and Section 2255 Proceedings

(a) Application for the Original Writ.An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district_court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

NO _____

In The Supreme Court Of The United States

OCTOBER TERM, 2000

REINIER NESLO,

Petitioner

V:

BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NOTICE OF APPEAL

Notice is hereby given than Reinier Neslo, the petitioner in the above captioned matter, hereby appeals to the Supreme Court of the United States the final judgment of the United States Court of Appeals for the Fifth Circuit entered in this action on August 3, 2000.

Dated October 27, 2000.

Reinier Neslo, #95210
Pro Se
Magnolia-1, Main Prison
Louisiana State Penitentary
Angola, LA 70712